



1983

Texas Civil Procedure

Ernest E. Figari Jr.

Thomas A. Graves

A. Erin Dwyer

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Ernest E. Figari Jr., et al., *Texas Civil Procedure*, 37 Sw L.J. 289 (1983)
<https://scholar.smu.edu/smulr/vol37/iss1/13>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

TEXAS CIVIL PROCEDURE

by

Ernest E. Figari, Jr.*

Thomas A. Graves**

A. Erin Dwyer***

THE major developments in the field of civil procedure during the survey period are found in judicial decisions and amendments to the Texas Rules of Civil Procedure.¹ This Article examines these developments and considers their impact on existing Texas procedure.

I. JURISDICTION OVER THE SUBJECT MATTER

The court considered the impact of an increase in the alleged amount in controversy on subject matter jurisdiction in *Mr. W. Fireworks, Inc. v. Mitchell*.² As originally filed, the plaintiff's petition alleged damages within the \$5,000 jurisdictional limit of the county court at law.³ By trial amendment, however, the plaintiff abandoned his prayer for \$750.00 in attorneys' fees and substituted a claim for "reasonable attorney's fees," thereby permitting a recovery in excess of the jurisdictional limit. The trial court awarded the plaintiff a judgment for \$6,803.30, \$5,760.00 of which represented attorney's fees. The court of civil appeals reversed, holding that the trial amendment was ineffective to increase the amount sought above the jurisdictional limit and thus modified the judgment to award only \$750.00 in attorneys' fees.⁴ Following two earlier cases,⁵ the supreme

* B.S., Texas A&M University; LL.B., University of Texas; LL.M., Southern Methodist University. Attorney at Law, Dallas, Texas.

** B.B.A., New Mexico State University; J.D., Southern Methodist University. Attorney at Law, Dallas, Texas.

*** B.A., University of Notre Dame; J.D., University of Texas. Attorney at Law, Dallas, Texas.

1. The amendments modified TEX. R. CIV. P. 452 and 749(C) and added TEX. R. CIV. P. 742(a) and 747(a). These changes became effective Aug. 15, 1982. See *Supreme Court Amends Rules of Civil Procedure Effective Aug. 15, 1982*, 45 TEX. B.J. 789 (1982).

2. 622 S.W.2d 576 (Tex. 1981) (per curiam).

3. See TEX. REV. CIV. STAT. ANN. art. 1970a (Vernon Pam. Supp. 1965-1982).

4. 622 S.W.2d at 577.

5. *Flynt v. Garcia*, 587 S.W.2d 109 (Tex. 1979) (per curiam) (when original suit was within jurisdictional limits of court and subsequent amendment sought only damages accruing because of passage of time, county court had power to entertain suit even though trial amendment raised amount in controversy over maximum jurisdictional limit); *Cantu v. J. Weingarten's, Inc.*, 616 S.W.2d 290 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (plaintiff's amended original petition, which increased total amount of claimed damages beyond court's jurisdictional limits, did not deprive court of jurisdiction absent proof from defendant that allegations in plaintiff's original petition were made in bad faith); see *Haginas v. Malbis Memorial Found.*, 163 Tex. 274, 354 S.W.2d 368 (1962); *Isbell v. Kenyon-Warner Dredging Co.*, 113 Tex. 528, 261 S.W. 762 (1924).

court reversed the appellate court decision. Noting that the plaintiff apparently amended his petition to recover the attorneys' fees accruing since the filing of the suit, the court reiterated the rule in *Flynt v. Garcia*⁶ that "[w]here jurisdiction is once lawfully and properly acquired, it will not be defeated by subsequent amendments seeking any additional damages that are accruing because of the passage of time."⁷

II. JURISDICTION OVER THE PERSON

The reach of the Texas long-arm statute, article 2031b,⁸ continued to be the subject of judicial measurement. Section 3 of article 2031b provides that when a nonresident "engages in business in this State," the statute authorizes service on the nonresident "in any action, suit or proceedings arising out of such business."⁹ This "arising out of" language has raised questions concerning a plaintiff's right to establish personal jurisdiction under article 2031b on nonresidents on the basis of activities unrelated to the asserted cause of action. State court decisions have opted for a broader construction of the statute, concluding that article 2031b reaches federal constitutional limits.¹⁰ Nevertheless, the Fifth Circuit, applying article 2031b more literally, held during the survey period that the statute expressly limits its application to causes of action "arising out of" activities done within the state, thereby falling short of the reach permitted by the federal Constitution.¹¹ Rejecting this interpretation, the Texas Supreme

6. 587 S.W.2d 109 (Tex. 1979).

7. 622 S.W.2d at 577.

8. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1982-1983).

9. *Id.* § 3 (Vernon 1964).

10. See, e.g., *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978) ("art. 2031b reaches as far as the federal constitutional requirements of due process will permit"); *Michigan Gen. Corp. v. Mod-U-Kraf Homes, Inc.*, 582 S.W.2d 594, 595 (Tex. Civ. App.—Dallas 1979, writ ref'd) ("the reach of article 2031b is limited only by the Fourteenth Amendment to the United States Constitution"); *N.K. Parrish, Inc. v. Schrimsher*, 516 S.W.2d 956, 958 (Tex. Civ. App.—Amarillo 1974, no writ) ("the statute represents an effort by Texas to extend its *in personam* jurisdiction over non-residents to the maximum permitted by the federal constitutional requirements of due process"); see also *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 491 (5th Cir. 1974) ("article 2031b represents an effort by Texas to reach as far as federal constitutional requirements of due process will permit in exercising jurisdiction over the persons of nonresident defendants"); *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1234 (5th Cir. 1973) ("[a]rticle 2031b represents an effort by Texas to exploit to the fullest the limits of *in personam* jurisdiction"); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69, 73 (5th Cir. 1961) ("the Texas purpose [in enacting art. 2031b] was to exploit to the maximum the fullest permissible reach under federal constitutional restraints"); *Clark Advertising Agency, Inc. v. Tice*, 331 F. Supp. 1058, 1059 (N.D. Tex. 1971), *aff'd*, 490 F.2d 834 (5th Cir. 1974) ("[t]he Texas 'long-arm statute' . . . is to be given the broadest possible construction, subject only to basic constitutional requirements"); Thode, *In Personam Jurisdiction: Article 2031b, the Texas "Long-Arm" Jurisdiction Statute, and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 307 (1964).

11. *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981), discussed in Figari, Graves, & Gordon, *Texas Civil Procedure, Annual Survey of Texas Law*, 36 Sw. L.J. 435, 436-37 (1982) [hereinafter cited as Figari, 1982 *Annual Survey*]; see *Wyatt v. Kaplan*, 686 F.2d 276, 295 (5th Cir. 1982); *Jim Fox Enters., Inc. v. Air France*, 664 F.2d 63 (5th Cir. 1981); *Placid Invs., Ltd. v. Girard Trust Bank*, 662 F.2d 1176, 1178 (5th Cir. 1981), *vacated on rehearing*, 689 F.2d 1218 (5th Cir. 1982).

Court in *Hall v. Helicopteros Nacionales de Colombia, S.A.*¹² authoritatively ruled that business contacts unrelated to the asserted cause of action are relevant to and will support the exercise of personal jurisdiction under article 2031b.¹³ Reaffirming that the Texas long-arm statute reaches as far as due process will permit, the supreme court emphasized that while a nexus between the asserted cause of action and the defendant's contacts with the forum state is helpful when considering jurisdiction, such a nexus is not required when the nonresident defendant's presence in the forum through numerous contacts satisfies the demands of due process.¹⁴ The Fifth Circuit, bound by the *Erie* doctrine,¹⁵ subsequently reversed its prior decisions and followed *Hall's* lead.¹⁶

Intent on improving the accuracy of its predictions of Texas law in this area, the Fifth Circuit focused on rule 108 of the Texas Rules of Civil Procedure.¹⁷ Since a plaintiff has the option of relying upon rule 108 to effect service on a nonresident in either state or federal court,¹⁸ the Fifth Circuit in *Placid Investments, Ltd. v. Girard Trust Bank*¹⁹ confronted the question of whether rule 108 could serve as a less restrictive substitute for article 2031b. Answering in the negative, the Fifth Circuit concluded that a rule of procedure propounded by the Texas Supreme Court could not be used to circumvent the substantive jurisdictional requirements the Texas Legislature developed in article 2031b because it would nullify the article.²⁰ In view of two earlier state court decisions that provide a more liberal Texas reading of rule 108,²¹ the Fifth Circuit's forecast of Texas law

12. 638 S.W.2d 870 (Tex. 1982), *cert. granted*, 103 S. Ct. 1270, — L. Ed. 2d — (1983).

13. *Id.* at 872; *see Black v. Acme Markets, Inc.*, 564 F.2d 681, 685-86 (5th Cir. 1977); *Wilkerson v. Fortuna Corp.*, 554 F.2d 745, 750 (5th Cir.), *cert. denied*, 434 U.S. 939 (1977); *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1234-35 (5th Cir. 1973); *Coulter v. Sears Roebuck & Co.*, 426 F.2d 1315, 1318-19 (5th Cir. 1970); *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591, 595 (5th Cir. 1969); *Hopper v. Mayeaux*, 545 F. Supp. 1174, 1177 (S.D. Tex. 1982); *Well Servs., Ltd. v. Pyramid Derrick & Equip. Corp.*, 526 F. Supp. 481, 484-85 (S.D. Tex. 1981); *Docutel Corp. v. S.A. Matra*, 464 F. Supp. 1209, 1220 (N.D. Tex. 1979) (cases holding that business contacts unrelated to the asserted cause of action can support personal jurisdiction under art. 2031b).

14. 638 S.W.2d at 872.

15. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *see Walker v. Savell*, 335 F.2d 536, 540-41 (5th Cir. 1964); *Hopper v. Mayeaux*, 545 F. Supp. 1174, 1177 (S.D. Tex. 1982).

16. *Placid Invs., Ltd. v. Girard Trust Bank*, 689 F.2d 1218, 1219 (5th Cir. 1982), *vacating* 662 F.2d 1176 (5th Cir. 1982).

17. TEX. R. CIV. P. 108. Rule 108 authorizes service on a nonresident or absent defendant "to the fullest extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam." *Id.*

18. *See* FED. R. CIV. P. 4(e) (authorizing service in federal court on nonresidents in same manner prescribed in statute or rule of court of the state in which the federal court is held). *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1112-1113 (1969).

19. 662 F.2d 1176 (5th Cir. 1981), *vacated on rehearing*, 689 F.2d 1218 (1982); *see Wyatt v. Kaplan*, 686 F.2d 276, 285 n.18 (5th Cir. 1982).

20. 662 F.2d at 1179.

21. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 n.1 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978) (the purpose of the amendment to rule 108 is to secure in personam jurisdiction to constitutional limits); *Fox v. Fox*, 559 S.W.2d 407, 409 (Tex. Civ. App.—Austin 1977, no writ) (rule 108 can be viewed as a long-arm statute to obtain personal jurisdiction); *see Grantham v. Aetna Life & Cas.*, 455 F. Supp. 440, 441 n.1 (N.D. Tex.

on this point would appear to be less than accurate.

Siskind v. The Villa Foundation for Education, Inc.,²² recently decided by the Texas Supreme Court, is a substantive yardstick for measurement of the Texas long-arm statute. In *Siskind* the supreme court adopted the "fiduciary shield" principle²³ and applied it to the determination of the amenability of nonresident officers or employees of a foreign corporation to service under article 2031b for acts they performed in the forum state on behalf of the corporation.²⁴ The plaintiff, a Texas parent of a minor who had been enrolled in a specialized school that a foreign corporation in Arizona operated, sued the corporation and four of its officers who were Arizona residents for breach of contract and fraud. Service was effected on each defendant under article 2031b. The trial court dismissed the suit as to all of the defendants for lack of personal jurisdiction, and the plaintiff appealed. On review the supreme court sustained nonresident service upon the defendant corporation.²⁵ The court emphasized that the school had continuously advertised its services in Texas and had mailed numerous informational packets, applications for enrollment, and enrollment contracts to residents of Texas.²⁶ Affirming the dismissal of the individual defendants, however, the court noted that the plaintiff failed to assert that the individual defendants had committed any act in Texas apart from their employer's business activities.²⁷ The supreme court shielded the individual defendants from the jurisdictional effect of these acts by proclaiming that nonresident employees of a foreign corporation cannot be sued in Texas solely because the employer solicits business in Texas; the defendant's contacts are the determining factor.²⁸

1978); see also W. DORSANEO, TEXAS LITIGATION GUIDE § 32-50[2], at 32-18 (1981) (use of rule 108 when it cannot be shown that statutory method provided actual notice of suit to nonresident); Figari, 1982 *Annual Survey*, *supra* note 11, at 436 (rule 108 offers full constitutional reach in effecting service upon nonresident); Sampson, *Long-Arm Jurisdiction Marries the Texas Family Code*, 38 TEX. B.J. 1023, 1033 n.20 (1975) (rule 108 can be construed as procedural enabling provision ratifying existing long-arm statutes); Weintraub, *Hall v. Helicopteros: The Texas Long-Arm's Grasp Exceeds Its Reach*, 2 TEX. B. LITIGATION SEC. REP. 1, 4-5 (1983). But see Letter from Hans W. Baade to the Texas Bar Journal (Dec. 1975), reprinted in 38 TEX. B.J. 988 (1975) (rule 108 as an impermissible extension of the Texas long-arm statute).

22. 642 S.W.2d 434 (Tex. 1982).

23. The "fiduciary shield" principle provides: "[I]f an individual has contact with a particular state only by virtue of his acts as a fiduciary of the corporation, he may be shielded from the exercise, by that state, of jurisdiction over him personally on the basis of that conduct." *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981); accord *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929 (5th Cir. 1974) (jurisdiction over the corporation's individual officers cannot be based solely upon jurisdiction over the corporation); *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1281 n.8 (10th Cir. 1969) (even if a foreign corporation is subject to service because it transacts business through agents operating in the forum state, unless the agents transact business on their own behalf apart from the corporation, such agents are not engaged in business so as to allow the application of the long-arm statute to them as individuals).

24. 642 S.W.2d at 434.

25. *Id.* at 435.

26. *Id.*

27. *Id.* at 437.

28. *Id.*

Familia de Boom v. Arosa Mercantil, S.A.,²⁹ reported in a previous survey period, provided encouragement to recalcitrant defendants involved in jurisdictional contests in federal forums. In that case the Fifth Circuit found the fourteenth amendment precluded a trial court from establishing personal jurisdiction as a sanction for the failure to comply with discovery orders directing disclosure of jurisdictional facts.³⁰ The United States Supreme Court, however, rejected this holding in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*.³¹ In *Compagnie des Bauxites* the Court concluded that when the defendant has intentionally resisted discovery of jurisdictional facts the establishment of personal jurisdiction as a sanction does not violate due process.³² Observing that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment and then challenge that judgment on jurisdictional grounds in a collateral proceeding,"³³ the Court maintained that "by submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction."³⁴

III. SPECIAL APPEARANCE

Rule 120a, which governs special appearances to challenge personal jurisdiction in state court, requires a party making a special appearance to file a sworn motion prior to any other pleading or motion.³⁵ As originally adopted, rule 120a contained no provision allowing an amendment of the

29. 629 F.2d 1134 (5th Cir. 1980), *cert. denied*, 451 U.S. 1008 (1981). *Contra* *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877 (3d Cir. 1981), *aff'd sub nom.* *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinea*, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982); *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979); *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971).

30. 629 F.2d at 1138-39. The plaintiffs sued two nonresident corporations seeking recovery for damages arising from the sinking of a foreign vessel. Service was effected under TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1983), and the defendants responded with a motion to dismiss for lack of personal jurisdiction. Attempting to establish the defendants' contacts with the forum, the plaintiffs propounded interrogatories to the defendants. The defendants evaded the discovery and, after a hearing on the matter, the court ordered them to respond fully within a specified period. After the defendants failed to comply with the order, the trial court entered a default judgment against them for their contumacious conduct. On an appeal from the default judgment the appellate court reiterated that in the federal courts the burden is on a plaintiff to establish jurisdiction when challenged. The court noted, however, that in the instant case the plaintiffs had been precluded from presenting jurisdictional evidence in the exclusive possession of the defendants because the defendants refused to disclose the information in response to discovery procedures. 629 F.2d at 1139. Nevertheless, in finding that due process required the necessary facts to be of record, the court of civil appeals held that the plaintiffs are not exempt from the burden of proof even though they had been unable to obtain information from the defendants. *Id.*; see Figari, 1982 *Annual Survey*, *supra*, note 11, at 437-38.

31. 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982).

32. *Id.* at 2103-04, 72 L. Ed. 2d at 501-02.

33. *Id.* at 2106, 72 L. Ed. 2d at 504.

34. *Id.*

35. TEX. R. CIV. P. 120a.

special appearance motion to correct a deficiency.³⁶ Consequently, the filing of an unsworn motion constituted a general appearance and subjected the movant to the court's jurisdiction for all purposes.³⁷ The amended version of rule 120a, however, now permits amendments to special appearance motions to cure defects.³⁸ While focusing on this aspect of the rule, the court of civil appeals in *Carbonit Houston, Inc. v. Exchange Bank*³⁹ followed the lead of two earlier cases,⁴⁰ and concluded that rule 120a permits an amendment to verify the motion.⁴¹

IV. SERVICE OF PROCESS

Two decisions during the survey period invalidated service of process on the basis of inadvertent errors occurring during the execution of service. In *Kem v. Krueger*⁴² an officer served a citation 123 days after its issuance despite a stipulation in the citation that provided for a ninety-day limitation on effectiveness.⁴³ Contending that the citation was void because the officer failed to serve the citation within the ninety days, the defendant sought to set aside a default judgment rendered against him on the basis of the service. The appellate court concluded that the time requirement stated in the citation for effecting service was mandatory, held that service over the defendant consequently was void on its face, and invalidated the default judgment.⁴⁴

A similar error occurred in *Exposition Apartments Co. v. Barba*,⁴⁵ in which the petition directed that service be effected upon the defendant company by serving the defendant's manager, "Mr. Thompson," at a stated address. In accordance with this directive the citation recited service on "Mr. Thompson." On appeal from a default judgment against the defendant company, the court held that a record showing service on a representative identified only by his surname was insufficient to support a default judgment.⁴⁶

36. See Tex. R. Civ. P. 120a (Vernon 1966).

37. *Stewart v. Walton Enters., Inc.*, 496 S.W.2d 956, 959 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); *Austin Rankin Corp. v. Cadillac Pool Corp.*, 421 S.W.2d 733, 734 (Tex. Civ. App.—Beaumont 1967, no writ).

38. TEX. R. CIV. P. 120a. See generally Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 30 Sw. L.J. 293, 294 (1976).

39. 628 S.W.2d 826 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

40. See *Stegall & Stegall v. Cohn*, 592 S.W.2d 427, 429 (Tex. Civ. App.—Fort Worth 1979, no writ) (record did not support plaintiff's contention that defendants waived their special appearance by failing to seek a hearing on the motion to dismiss); *Dennett v. First Continental Inv. Corp.*, 559 S.W.2d 384, 385 (Tex. Civ. App.—Dallas 1977, no writ) (special appearances may be amended to cure defects); cf. *Duncan v. Denton County*, 133 S.W.2d 197 (Tex. Civ. App.—Fort Worth 1939, writ dismissed) (amendment of unsworn controverting affidavit to add verification permitted).

41. 628 S.W.2d at 828.

42. 626 S.W.2d 143 (Tex. Ct. App.—Fort Worth 1981, no writ).

43. *Id.* at 144; see TEX. R. CIV. P. 101.

44. 626 S.W.2d at 144; accord *Lemoth v. Cimbalisat*, 236 S.W.2d 681 (Tex. Civ. App.—San Antonio 1951, writ ref'd).

45. 630 S.W.2d 462 (Tex. Ct. App.—Austin 1982, no writ).

46. *Id.* at 465; accord *Brown v. Robertson*, 28 Tex. 555 (1866).

Article 2.11 of the Texas Business Corporation Act⁴⁷ sets forth the procedure for effecting service on a corporation. This statute allows for service of process on the secretary of state if a corporation's registered agent cannot be located. The secretary of state then must send a copy of the process by registered mail to the corporation's registered office. In *Txxn, Inc. v. D/FW Steel Co.*⁴⁸ the service of process on the defendant corporation was made in this fashion, but the postal service returned the copy of process with the notation that it was "Not Deliverable As Addressed, Unable to Forward."⁴⁹ Nevertheless, since the plaintiff had fulfilled the requirements of article 2.11, the trial court entered a default judgment against the corporation. Subsequently, the defendant corporation, which apparently had not maintained a properly registered office, attacked the default judgment by contending that due process had been violated because it had not received actual notice of the suit and the plaintiff knew the defendant corporation's actual location. While the record indicated that the plaintiff was aware that the corporation was operating a place of business at a location other than the one listed with the secretary of state, the appellate court held that this did not suggest it was amenable to service at that address.⁵⁰ The court found that due process had been met and held that the plaintiff's efforts at effecting service complied with article 2.11.⁵¹ Thus, the failure of this method of service resulted from the defendant's failure to meet the statutory requirements of properly maintaining an accurate registered office and not because of an omission by the plaintiff.⁵²

The decision of *Encore Builders v. Wells*⁵³ stands as a warning to plaintiffs' attorneys that in order to support a default judgment, the pleadings must adequately allege the service agent's authority. In *Wells* the petition merely alleged that the defendant was a business, without specifying the type of business entity, and that its "agent for service of process is Mike Catero."⁵⁴ After service was effected on the agent, the defendant failed to answer. The plaintiff then secured an interlocutory default judgment, and after the default judgment had become final the defendant attacked it by writ of error. Finding the plaintiff's pleadings insufficient to support a default judgment, the court of appeals set aside the judgment, emphasizing that merely alleging agency will not permit a default judgment.⁵⁵

Newly enacted rule 742a,⁵⁶ which pertains to forcible entry and detainer suits, contains the following provisions: It authorizes substituted service upon the defendant-tenant by delivery of process to the premises in ques-

47. TEX. BUS. CORP. ACT ANN. art. 2.11 (Vernon 1980).

48. 632 S.W.2d 706 (Tex. Ct. App.—Fort Worth 1982, no writ).

49. *Id.* at 708.

50. *Id.*

51. *Id.*

52. *Id.* at 709.

53. 636 S.W.2d 722 (Tex. Ct. App.—Corpus Christi 1982, no writ).

54. *Id.* at 722-23.

55. *Id.* at 723; accord *White Motor Co. v. Loden*, 373 S.W.2d 863 (Tex. Civ. App.—Dallas 1963, no writ).

56. TEX. R. CIV. P. 742a.

tion. When a sworn complaint lists all the defendant's known home and work addresses in the country where the premises are located, and the record reflects that the service officer was unsuccessful in effecting service upon the defendant by either personal service or by leaving it with someone over sixteen years of age at his usual place of abode, the justice court may authorize service upon defendant by delivery of process to the premises. Once the court authorizes such service, the serving officer must place the citation inside the premises by inserting it through a mail chute or slipping it under the front door at least six days before the return date, and on the same or the next day he must send a copy by first class mail to the defendant at the premises in question. An officer effecting substituted service in this manner must note on the return both the date of delivery to the premises and the date of mailing.

V. VENUE

The Texas comparative negligence statute, article 2212a, provides in section 2(g) that "[a]ll claims for contribution between named defendants in the primary suit shall be determined in the primary suit."⁵⁷ As noted in a prior survey,⁵⁸ two conflicting interpretations have developed in the Texas courts of appeals concerning the language "named defendants in the primary suit" and, thus, as to the venue provision's scope.⁵⁹ This controversy appears now to have been settled by the supreme court's recent decision in *Arthur Brothers, Inc. v. U.M.C., Inc.*⁶⁰ In *Arthur Brothers* the plaintiff filed suit against three corporate defendants alleging negligence and other claims. Since two of the original defendants filed third-party claims for contribution and indemnity against another company, the plaintiff amended its petition to include that company as the fourth named defendant. The trial court sustained both the impleaded company's plea of privilege to the plaintiff's claim and its plea to the third-party claim against it for contribution. On appeal, however, the court of appeals reversed the trial court and rendered judgment that the plea of privilege be denied as to the third-party claim.⁶¹ That court held that under article 2212a the fourth defendant became a "named defendant in the primary suit" when the two original defendants filed their contribution claim against it.⁶² In a per

57. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1982-1983).

58. See Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 35 Sw. L.J. 359, 369 (1981) [hereinafter cited as Figari, *1981 Annual Survey*].

59. Compare *Blair v. Thomas*, 604 S.W.2d 471 (Tex. Civ. App.—Dallas 1980, no writ), and *Maintenance Equip. Contractors v. John Deere Co.*, 554 S.W.2d 28 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ dismissed) (cases holding that after nonresident defendant's original plea of privilege was sustained he was no longer a "named" defendant in the original action), with *State Dep't of Highways & Pub. Trans. v. Hardy*, 607 S.W.2d 611 (Tex. Civ. App.—Tyler 1980, writ dismissed w.o.j.), and *Gonzales v. Blake*, 605 S.W.2d 634 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (cases holding that defendant's cross claim for contribution against co-defendants has to be determined in the primary suit).

60. 26 Tex. Sup. Ct. J. 143 (Dec. 15, 1982) (per curiam).

61. 626 S.W.2d 819 (Tex. Ct. App.—Corpus Christi 1981). The plaintiff did not appeal the trial court's order transferring his claim against the fourth defendant to another county.

62. *Id.* at 822.

curiam opinion refusing the third-party defendant's application for a writ of error, the supreme court affirmed the court of appeals decision.⁶³ The supreme court explained: "The purpose of article 2212a, section 2(g) is to avoid separate trials of the plaintiff's claims against several defendants. The purpose of the statute is best served by maintaining the contribution claim in the original suit."⁶⁴ The *Arthur Brothers* decision effectively overruled *State v. Reed*,⁶⁵ a case decided earlier in the survey period, which held that article 2212a did not govern the venue of third-party actions.⁶⁶

Gilstrap v. Beakley,⁶⁷ involving a cross-claim one defendant filed against its co-defendant, discussed venue of ancillary claims. The appellate court first determined that the cross-claim had the same primary purpose, arose out of the same transaction, and involved identical legal and factual issues as the plaintiff's claim.⁶⁸ The court of appeals then reiterated its holding in *Wallace v. Rockwell International Corp.*⁶⁹ that cross-claims are maintainable in the county of the primary action to avoid multiplicity of suits.⁷⁰

The *Middlebrook* doctrine is a long-standing venue rule predicated on the public policy of avoiding a multiplicity of suits.⁷¹ Under this doctrine, a plaintiff who in good faith asserts two or more claims properly joined in a single action against the same defendant can maintain venue upon all of the claims in a county where venue is proper as to one of the claims.⁷² Earlier cases focusing on the relative size of the claims suggested that the *Middlebrook* doctrine does not apply when the cause of action upon which venue is predicated is merely incidental to the main cause of action.⁷³ The court in *Texas Oil & Gas Corp. v. Moore*,⁷⁴ however, followed the current, more progressive view⁷⁵ and concluded that the relative magnitude of the relief sought in the separate claims was not controlling.⁷⁶ According to the reasoning in *Moore*, courts should not scrutinize each claim separately to establish dominance of a single cause of action over the other; but rather, "public policy favors conferring venue on all properly joined causes of

63. 26 Tex. Sup. Ct. J. at 144.

64. *Id.*

65. 626 S.W.2d 184 (Tex. Ct. App.—Fort Worth 1981, no writ).

66. *Id.* at 186 (citing *Chaney v. Coleman Co.*, 567 S.W.2d 882 (Tex. Civ. App.—Dallas 1978, no writ), discussed in Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 33 Sw. L.J. 455, 464 (1979)).

67. 636 S.W.2d 736 (Tex. Ct. App.—Corpus Christi 1982, no writ).

68. *Id.* at 740.

69. 568 S.W.2d 404, 407 (Tex. Civ. App.—Corpus Christi 1978, no writ).

70. 636 S.W.2d at 741.

71. See *Middlebrook v. David Bradley Mfg. Co.*, 86 Tex. 706, 26 S.W. 935 (1894).

72. *Id.*, 26 S.W.2d at 935.

73. See, e.g., *Auto Ref. Corp. v. Smith*, 84 S.W.2d 296, 297 (Tex. Civ. App.—Fort Worth 1935, no writ); *Bateman v. McGee*, 50 S.W.2d 374, 375 (Tex. Civ. App.—Dallas 1932, no writ).

74. 630 S.W.2d 450 (Tex. Ct. App.—Corpus Christi 1982, writ dismissed).

75. See *Lindsey v. Security Sav. Ass'n*, 556 S.W.2d 570 (Tex. Civ. App.—Dallas 1977, no writ); *Brazos Valley Harvestore Sys., Inc. v. Beavers*, 535 S.W.2d 797, 800 (Tex. Civ. App.—Tyler 1976, writ dismissed); *Burke v. Scott*, 400 S.W.2d 385, 389 (Tex. Civ. App.—Austin 1966, writ dismissed). See generally Figari, *supra* note 66, at 464.

76. 630 S.W.2d at 453.

action to avoid a multiplicity of suits."⁷⁷

The court in *Rodriguez v. Jim Walter Homes, Inc.*⁷⁸ confronted the question of the effect an appellate court's reversal of an order overruling a plea of privilege has on a trial court's intervening judgment in favor of the defendant. After the trial court in that case overruled the defendant's plea of privilege, the defendant timely filed an appeal from the venue decision. The court of appeals sustained the plea of privilege.⁷⁹ The plaintiffs, however, applied for a writ of error with the supreme court, and the court suspended the transfer of the case pending final determination of the appeal. Meanwhile, the trial court continued to exercise jurisdiction over the suit following its entry of the order overruling the plea of privilege.⁸⁰ Before the appellate courts completed their review of the venue decision, the trial court entered a judgment dismissing the entire case with prejudice.

In a divided opinion, the Corpus Christi court of appeals reversed the judgment of dismissal and remanded the case to the transferee county for a new trial.⁸¹ Citing a line of other Texas court decisions, the majority concluded that sustaining the plea of privilege divested the trial court of jurisdiction to decide the case on the merits.⁸² Since the trial court order dismissed the case without jurisdictional support, the court of appeals found it immaterial that the judgment resolving the whole case favored the defendant.⁸³ The dissent on the other hand claimed that requiring a defendant who has already obtained a favorable judgment to retry the case simply because the trial court erroneously refused to transfer the case to the defendant's domicile was illogical and against public policy.⁸⁴ Relying on a dictum in *Goolsby v. Bond*,⁸⁵ the dissent favored the reversal of the trial court's judgment only when the venue was decided against the defendant.⁸⁶

*Carrasco v. Goatcher*⁸⁷ is a warning that a party seeking a change of venue due to prejudice and bias against him in the county of suit must

77. *Id.*

78. 638 S.W.2d 108 (Tex. Ct. App.—Corpus Christi 1982, no writ).

79. *Jim Walter Homes v. Altreche*, 605 S.W.2d 733 (Tex. Civ. App.—Corpus Christi 1980, writ dism'd).

80. See *Allen v. Woodward*, 111 Tex. 457, 239 S.W. 602 (1922) (plaintiff may proceed with the litigation on the merits when a plea of privilege is overruled). But see *Long v. Compton*, 398 S.W.2d 784, 785 (Tex. Civ. App.—Waco 1965, no writ) (perfection of appeal from order overruling a plea of privilege deprives the trial court of jurisdiction).

81. 638 S.W.2d at 111.

82. *Id.* at 110; see *Service Fin. Corp. v. Grote*, 172 S.W.2d 996 (Tex. Civ. App.—San Antonio 1943, no writ); *Conlee v. Burton*, 188 S.W.2d 713 (Tex. Civ. App.—Dallas 1942, no writ); *Wilson v. Ryan*, 163 S.W.2d 448 (Tex. Civ. App.—San Antonio 1942, no writ); *Smith v. First Nat'l Bank*, 147 S.W.2d 856 (Tex. Civ. App.—Galveston 1941, no writ); *O'Brien v. Smith*, 80 S.W.2d 459 (Tex. Civ. App.—El Paso 1935, no writ). All of these cases, however, involved a reversal of a judgment in favor of the plaintiff.

83. 638 S.W.2d at 111.

84. *Id.* (Gonzalez, J., dissenting).

85. 138 Tex. 485, 490, 163 S.W.2d 830, 833 (1942).

86. 638 S.W.2d at 111 (Gonzales, J., dissenting).

87. 623 S.W.2d 769 (Tex. Ct. App.—El Paso 1981, no writ).

comply with the strict proof requirements of rule 257⁸⁸ in order to invoke the trial court's discretion to transfer the cause. Rule 257 provides that to apply for change of venue in those circumstances a party must support his application with his own affidavit and the affidavits of three credible persons residing in the county of suit.⁸⁹ In *Carrasco* the application for change of venue was accompanied only by the plaintiff's affidavit and that of her granddaughter, who was not a resident of the county of suit. Although the court of appeals acknowledged that broad discretion to transfer a cause vests in the trial court when such an application is made, the court concluded that the plaintiff's application failed since it did not comply with the proof requirements established under the rule.⁹⁰ Thus, the trial court did not abuse its discretion by refusing the plaintiff's request for transfer because the plaintiff's defective application was insufficient to invoke the initial trial court discretion.⁹¹ In a dictum, the court noted that a party might be excused from furnishing the required affidavits because of the degree of prejudice against him, but the court then concluded that the plaintiff had failed to adduce any evidence correlating with that contention.⁹²

A statutory development of significance to bank practitioners occurred in the survey period when the United States Congress amended the venue provision for national banks. Prior to its amendment section 94 of the National Bank Act mandated that state court suits against national banks be brought in the county or city of the bank's principal place of business.⁹³ The Depository Institutions Act of 1982, however, restricts the scope of the national bank venue privilege by limiting its application to national banks for which a receiver has been appointed.⁹⁴ Thus, in the future the venue of most suits against national banks should be governed by the general venue statute.⁹⁵

VI. PLEADINGS

Rule 185 provides that a suit on a sworn account "shall be taken as prima facie evidence thereof, unless the party resisting such claim shall . . . file a written denial, under oath, stating [1] that each and every item is not just or true, or [2] that some specified item or items are not just *and* true."⁹⁶ In *Special Marine Products, Inc. v. Weeks Welding & Construction, Inc.*⁹⁷ the defendant filed a sworn denial that the account "was not just or

88. TEX. R. CIV. P. 257.

89. *Id.* 257(a).

90. 623 S.W.2d at 771.

91. *Id.*

92. *Id.*

93. 12 U.S.C. § 94 (1976), amended by Pub. L. No. 97-320, § 406, 96 Stat. 1512-13 (1982). See generally *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963) (§ 94 specifies the only courts in which a national bank can be sued).

94. Pub. L. No. 97-320, § 406, 96 Stat. 1512-13 (1982).

95. See TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982-1983).

96. TEX. R. CIV. P. 185 (emphasis added).

97. 625 S.W.2d 822 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).

true" in certain particulars.⁹⁸ Focusing on this language, the court of appeals held that, because the answer did not use the exact language specified for a partial denial of the account, it amounted to no more than a general denial and failed to satisfy rule 185.⁹⁹

*Lake Country Estates, Inc. v. Toman*¹⁰⁰ concerned the procedure to be followed at a hearing on a plea in abatement in a defendant's answer. Since the general rule places the burden on the party presenting a plea in abatement to support the plea with evidence, the court of appeals concluded that if no evidence is adduced, the plea is waived.¹⁰¹ Waiver does not occur, however, if the plaintiff admits in his petition the truth of the matters the defendant alleged in the plea.¹⁰²

A number of other cases involving questions with respect to pleadings were decided during the survey period. For example, in *Forderhouse v. Cherokee Water Co.*¹⁰³ the Texarkana court of appeals considered a suit on a written agreement, in which a counterclaim for reformation of such agreement had been severed from the primary claim. The appellate court held that the plea for reformation should not have been severed because it constituted a compulsory counterclaim.¹⁰⁴ Since "[b]oth claims arise out of the same transaction," it followed that "the counterclaim was required to be filed in this suit" and "if it was necessary that it be filed in this suit, it was also imperative that it be tried in the same cause."¹⁰⁵ Finally, two cases concluded that when the recovery of prejudgment interest was permitted by law, a petition containing a general prayer for relief was sufficient to support an award of such interest.¹⁰⁶

VII. LIMITATIONS

The discovery rule, which has been extended over the past decade to cover a variety of types of actions,¹⁰⁷ provides that the statute of limita-

98. *Id.* at 824 (emphasis added).

99. *Id.* at 825; *accord* *Crystal Invs. v. Manges*, 596 S.W.2d 853, 854 (Tex. 1980).

100. 624 S.W.2d 677 (Tex. Ct. App.—Fort Worth 1981, writ ref'd n.r.e.).

101. *Id.* at 679.

102. *Id.*

103. 623 S.W.2d 435 (Tex. Civ. App.—Texarkana 1981, writ granted).

104. *Id.* at 440-41.

105. *Id.* at 440; *accord* *Bohart v. First Nat'l Bank*, 536 S.W.2d 234 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.).

106. *Sanchez v. Matthews*, 636 S.W.2d 455, 461 (Tex. Ct. App.—San Antonio 1982, writ ref'd n.r.e.); *Arndt v. National Supply Co.*, 633 S.W.2d 919, 924 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *accord* *Arkansas La. Gas Co. v. Allison*, 620 S.W.2d 207, 212 (Tex. Civ. App.—Tyler), *rev'd on other grounds*, 624 S.W.2d 566 (Tex. 1981); *Golden v. Murphy*, 611 S.W.2d 914, 917 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *see also* *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 117 (Tex. 1978) (prejudgment interest is recoverable as matter of right when an ascertainable sum of money is determined to have been due and payable at a date certain prior to judgment).

107. *See, e.g.*, *Thrift v. Tenneco Chems., Inc.*, 381 F. Supp. 543 (N.D. Tex. 1974) (breach of warranty by drug manufacturer); *Kelley v. Rinkle*, 532 S.W.2d 947 (Tex. 1976), *noted in* Note, *Kelley v. Rinkle: Texas Embraces the Discovery Rule in Credit Libel*, 30 Sw. L.J. 950 (1976) (submission of false credit report by creditor); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967) (foreign object left in body by surgeon); *Atkins v. Crossland*, 417 S.W.2d 140 (Tex. 1967) (negligent preparation of tax return by accountant); *Jim Walter Homes, Inc. v. Cas-*

tions will not start running until the plaintiff discovers the true facts giving rise to his claimed damage or until the date discovery should reasonably have been made.¹⁰⁸ Since its judicial inception in 1967,¹⁰⁹ the rule most frequently has operated in suits against doctors for medical malpractice arising from negligently administered treatments.¹¹⁰

Accordingly, in *Wynn v. Mid-Cities Clinic*¹¹¹ the court of appeals applied the discovery rule in a malpractice suit against a physician for allegedly negligent administration of radiation treatments occurring twelve years prior to the institution of suit. While no evidence suggested that the physician had misrepresented facts to the plaintiff, thereby preventing timely discovery to institute a suit, the court found that the physician's withholding of information sufficiently justified invoking the discovery rule.¹¹²

Two cases decided during the survey period concerned the effect of tolling provisions on the applicable statute of limitations. In *Johnson v. McLean*¹¹³ the court of appeals considered the effect of article 5535¹¹⁴ on tolling the statute of limitations for imprisoned parties. Here, the prisoner brought an action against his former attorney for negligent representation. He did not serve the attorney, however, until three years after the alleged cause of action arose. The court held that the suit was barred by the two-year statute of limitations.¹¹⁵ Rejecting the prisoner's contention that article 5535 tolled the running of the limitations period during his imprison-

tillo, 616 S.W.2d 630 (Tex. Civ. App.—Corpus Christi 1981, no writ) (deceptive trade practices claim); see also Note, *Limitations of Actions*, 46 TEX. L. REV. 199 (1967). But see McClung v. Johnson, 620 S.W.2d 644 (Tex. Civ. App.—Dallas 1981, no writ) (discovery rule is inapplicable in legal malpractice suits).

108. See, e.g., Hayes v. Hall, 488 S.W.2d 412, 414 (Tex. 1972) (the statute of limitations begins to run from the time of the discovery of the true facts or from the date it should, using ordinary care and diligence, have been discovered); Anderson v. Sneed, 615 S.W.2d 898, 901 (Tex. Civ. App.—El Paso 1981, no writ). See generally Figari, 1982 Annual Survey, *supra* note 11, at 450.

109. The supreme court first pronounced the rule in Texas in Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967).

110. See, e.g., Hayes v. Hall, 488 S.W.2d 412 (Tex. 1972) (failure of a vasectomy operation); Newberry v. Tarvin, 594 S.W.2d 204 (Tex. Civ. App.—Corpus Christi 1980, no writ) (negligent insertion of an I.U.D.); Conerly v. Morris, 575 S.W.2d 633 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (negligent treatment of a fibroid tumor); Fitzpatrick v. Marlow, 553 S.W.2d 190 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (negligent nose surgery). But cf. Robinson v. Weaver, 550 S.W.2d 18 (Tex. 1977) (5-4 decision) (discovery rule is inapplicable to action for negligent diagnosis).

111. 628 S.W.2d 809 (Tex. Ct. App.—Texarkana 1981, writ ref'd n.r.e.).

112. *Id.* at 812.

113. 630 S.W.2d 790 (Tex. Ct. App.—Houston [1st Dist.] 1982, no writ).

114. TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon Supp. 1982-1983) provides:

If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues . . . a person imprisoned . . . the time of such disability shall not be deemed a portion of the time limited for the commencement of the action and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title.

See Jenkins v. State, 570 S.W.2d 175 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

115. TEX. REV. CIV. STAT. ANN. art. 5526, § 6 (Vernon Supp. 1982-1983) provides that all actions for injury done to the person of another shall be commenced and prosecuted within two years after the cause of action accrues.

ment, the court observed that the tolling statute was intended to protect "a legally disabled party who has no access to the courts, and to insure that his right to bring suit will not be precluded by the running of a limitations statute prior to the removal of his disability."¹¹⁶ Accordingly, since the prisoner actually filed the lawsuit during the term of his imprisonment, he was not entitled to the protective provisions of article 5535.¹¹⁷ Furthermore, the court held that once the prisoner elected to commence his suit he was held to the same standard of diligence in prosecuting the suit as one not so protected, notwithstanding the disability protection of article 5535.¹¹⁸ Consequently, the prisoner's mere filing of the suit within the period of limitations, unaccompanied by due diligence in procuring the issuance and service of process on the defendant, was insufficient to interrupt the running of the statute of limitations.¹¹⁹

The court discussed the tolling effect of the Texas "saving statute"¹²⁰ in *Long Island Trust Co. v. Dicker*.¹²¹ Article 5539a permits an action filed within the applicable limitations period, which is later dismissed for want of jurisdiction, to be refiled in a court of proper jurisdiction within sixty days of dismissal even if the statute of limitations has since expired.¹²² In *Long Island Trust Co.*, a case of first impression, the United States Court of Appeals for the Fifth Circuit held that the saving provision operates even in actions dismissed from a court outside of Texas.¹²³ Since no language in article 5539a restricts its application to cases dismissed in Texas courts, the Fifth Circuit refused to so limit the scope of the statute.¹²⁴ Likewise, the court rejected the appellee's contention that article 5539a applied only to cases dismissed for want of subject matter jurisdiction, reasoning instead that Texas courts would extend article 5539a to dismissals for lack of personal jurisdiction.¹²⁵

During the survey period two recently amended limitations statutes drew constitutional fire in causes of action arising prior to the effective date of the amendments. In *Sax v. Votteler*¹²⁶ the court upheld former article 5.82 of the insurance code, which provided a two-year limitation for

116. 630 S.W.2d at 793 (citing *Adler v. Beverly Hills Hosp.*, 594 S.W.2d 153 (Tex. Civ. App.—Dallas 1980, no writ)).

117. 630 S.W.2d at 793. In reaching this conclusion the court relied on prior federal and state court holdings that art. 5535 should apply only to those prisoners who suffer under actual disabilities and are unable to prosecute their civil suits from prison. *See, e.g.*, *Stephens v. Curtis*, 450 F. Supp. 141 (S.D. Tex. 1978); *Blum v. Elkins*, 369 S.W.2d 810 (Tex. Civ. App.—Waco 1963, no writ).

118. 630 S.W.2d at 794.

119. *Id.* at 793-94; *see Zale Corp. v. Rosenbau*, 520 S.W.2d 889 (Tex. 1975); *Rigo Mfg. Co. v. Thomas*, 458 S.W.2d 180 (Tex. 1970).

120. TEX. REV. CIV. STAT. ANN. art. 5539a (Vernon 1958).

121. 659 F.2d 641 (5th Cir. 1981).

122. TEX. REV. CIV. STAT. ANN. art. 5539a (Vernon 1958).

123. 659 F.2d at 647. The court noted that Texas law does not permit a question to be certified to the state supreme court even though it has never before been addressed by either the Texas courts or the federal courts interpreting Texas law. *Id.* at 646 n.8.

124. *Id.* at 646-47.

125. *Id.* at 647.

126. 636 S.W.2d 461 (Tex. Ct. App.—Texarkana 1982, writ granted).

filing malpractice suits against physicians carrying liability insurance,¹²⁷ against appellants' challenge that it contravened the due process and equal protection clauses of the fourteenth amendment.¹²⁸ Unlike the general limitations statute, article 5.82 was not tolled during minority except for the first six years of a claimant's life.¹²⁹ Appellants, the parents of an eleven-year-old allegedly victimized by a doctor's negligence, argued that the statute, which barred their claim filed three years after the date of the child's operation, treated minor medical malpractice claimants differently from minor claimants in other tort actions. Rejecting the parents' claim that the statute denied equal protection, the court of appeals concluded that the state had a legitimate purpose in enacting the statute.¹³⁰ In addition, the court rejected the appellant's claim that the statute violated the due process guarantee. The court reasoned that the limitations period was not so short as to deprive an injured plaintiff of a reasonable opportunity to enforce his or her claim.¹³¹

The one-year statute of limitations governing paternity suits did not fare as well and was declared unconstitutional by both the Texas and United States Supreme Courts. Prior to its amendment section 13.01 of the Texas Family Code barred paternity suits filed after an illegitimate child had reached the age of one.¹³² Because the statute thus erected a barrier to suits by illegitimate children seeking support from their natural fathers, and legitimate children encountered no similar barrier, the United States Supreme Court in *Mills v. Habluetzel*¹³³ held that the limitations statute violated the equal protection clause of the fourteenth amendment.¹³⁴ Three weeks later the Texas Supreme Court followed suit in *In re J.A.M.*¹³⁵ Although the court previously had granted the writ of error in

127. 1975 Tex. Gen. Laws, ch. 330, § 1, at 864.

128. U.S. CONST. amend. XIV, § 1. The careful practitioner should note, however, that the Texas Supreme Court has granted an application for writ of error in *Sax* for the purpose of determining the constitutionality of the statute. See 26 Tex. Sup. Ct. J. 154 (Jan. 8, 1983).

129. TEX. INS. CODE ANN. art. 5.82, § 4, *repealed by* 1977 Tex. Gen. Laws, ch. 817, § 41.03, at 2064, imposed a two-year statute of limitations on all persons regardless of minority "except that minors under the age of six years [had] until their eighth birthday in which to file." The essence of art. 5.82 was recodified as a part of § 10.01 of the Medical Liability and Insurance Improvement Act of Texas, TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1982-1983); however, the new statute is tolled during the first twelve years of a minor's life.

130. 636 S.W.2d at 465. The court found that the statute's purpose was to provide an insurance rate structure that would enable health care providers to secure liability insurance, "thus avoiding a crisis peculiar to that of torts." *Id.* The court also observed that art. 5.82 had survived past challenges to its constitutionality based on a denial of equal protection. *Id.*; see *Littlefield v. Hays*, 609 S.W.2d 627 (Tex. Civ. App.—Amarillo 1980, no writ); *Wallace v. Homan & Crimen, Inc.*, 584 S.W.2d 322 (Tex. Civ. App.—El Paso 1979, writ *ref'd n.r.e.*).

131. 636 S.W.2d at 463-64. In a dictum the court also stated that art. 5.82 did not violate the open courts provision of the Texas Constitution. *Id.* at 464; see TEX. CONST. art. I, § 13.

132. 1975 Tex. Gen. Laws, ch. 476, § 13.01, at 1261-62. The amended version of the statute provides a four-year statute of limitations. TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1982-1983).

133. 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982).

134. See U.S. CONST. amend. XIV, § 1.

135. 631 S.W.2d 730 (Tex. 1982).

J.A.M. in order to resolve a conflict between the courts of appeals,¹³⁶ it postponed its decision pending the result in *Mills*.¹³⁷ Both of the high courts, however, carefully avoided any prejudgment of the amended statute's constitutionality.¹³⁸

Personal injury suits are normally barred if not filed within two years of the date of injury.¹³⁹ If a plaintiff's injuries result from defective products, however, the plaintiff can avoid the two-year limitations period by filing suit based on a breach of an implied warranty of merchantability.¹⁴⁰ The suit would then be governed by the four-year contract limitations period specified in the Texas Uniform Commercial Code.¹⁴¹ *Rothe v. Ford Motor Co.*¹⁴² extended this rationale further, holding that the Code's four-year statute of limitations likewise governs suits for breach of an express warranty even if the plaintiff also seeks to recover damages for personal injuries.¹⁴³ According to the *Rothe* decision, the language of section 2.715 of the Code¹⁴⁴ permits recovery for personal injuries in actions for breach of either expressed or implied warranty.¹⁴⁵

Article 5539c¹⁴⁶ extends the limitations period up to an additional thirty days beyond the answer date on counterclaim or cross-claim that would otherwise be barred by the applicable statute of limitations, provided that the cross-claim arises out of the same transaction or occurrence that is the basis of the plaintiff's suit. In *Beaumont Coca-Cola Bottling Co. v. Cain*¹⁴⁷ the Beaumont court of appeals refused to apply article 5539c to a contribution action between tortfeasors. In *Cain* the driver of an automobile sued the owner of a truck for damages resulting from a collision of the two

136. Compare *In re J.A.M.*, 605 S.W.2d 332 (Tex. Civ. App.—Fort Worth 1981), *aff'd*, 631 S.W.2d 730 (Tex. 1982) (statute requiring paternity action to be brought within one year of birth of illegitimate child is unconstitutional), with *Texas Dep't of Human Resources v. Hernandez*, 595 S.W.2d 189 (Tex. Civ. App.—Corpus Christi 1980, no writ) (suit brought more than one year after birth of child was not timely), and *Texas Dep't of Human Resources v. Chapman*, 570 S.W.2d 46 (Tex. Civ. App.—Dallas 1978, writ *ref'd n.r.e.*) (statute requiring paternity action to be brought within one year of birth of illegitimate child does not deny due process).

137. 631 S.W.2d at 731.

138. 102 S. Ct. at 1558, 71 L. Ed. 2d at 780 (O'Connor, J., concurring); 631 S.W.2d at 732.

139. TEX. REV. CIV. STAT. ANN. art. 5526, § 6 (Vernon Supp. 1982-1983).

140. See *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456 (Tex. 1980), discussed in Figari, 1981 *Annual Survey*, *supra* note 58, at 373-74.

141. TEX. BUS. & COM. CODE ANN. § 2.725(a) (Tex. UCC) (Vernon 1968).

142. 531 F. Supp. 189 (N.D. Tex. 1981).

143. *Id.* at 194.

144. TEX. BUS. & COM. CODE ANN. § 2.715 (Tex. UCC) (Vernon 1968) provides that "[c]onsequential damages resulting from the seller's breach include . . . (2) injury to person or property proximately resulting from any breach of warranty."

145. 531 F. Supp. at 194.

146. TEX. REV. CIV. STAT. ANN. art. 5539c (Vernon Supp. 1982-1983). The statute was intended to change the result in cases such as *Morris-Buick Co. v. Davis*, 127 Tex. 41, 91 S.W.2d 313 (1936) (statute of limitations does not apply to defense operating merely as negation of plaintiff's asserted right to recover). See generally McElhaney, *Texas Civil Procedure, Annual Survey of Texas Law*, 24 Sw. L.J. 179, 192 (1970).

147. 628 S.W.2d 99 (Tex. Ct. App.—Beaumont 1981, writ *ref'd n.r.e.*). The holding in *Cain* appears to be at odds with the prior decision in *Smith v. Lone Star Cadillac, Inc.*, 470 S.W.2d 791 (Tex. Civ. App.—Waco 1971, no writ).

vehicles. Two years after the suit was filed the plaintiff amended the petition to include a passenger in the car as an additional plaintiff. One year later the defendant filed its cross-action against the driver of the car, seeking indemnity or contribution for any sums that might be awarded to the passenger. The trial court, however, sustained the driver's motion for summary judgment on the cross-action because the defendant did not file his cross-action within the extended period under article 5539c, and the two-year statute of limitations otherwise applicable had already expired.¹⁴⁸ The court of appeals reversed the trial court's judgment and reinstated the cross-action on the grounds that the statute of limitations on the cross-action did not begin to run until the truck owner's right of contribution accrued.¹⁴⁹ The court observed that the statute of limitations to a claim for contribution does not normally begin to run until one of two or more joint tortfeasors has paid more than his share of a judgment.¹⁵⁰ Because the claims in *Cain* were governed by article 2212a,¹⁵¹ the Texas comparative negligence statute, the truck driver was required to assert his claim for contribution in the primary suit. According to the court, the defendant did just that; consequently, his potential right to contribution could not be cut off by an erroneous application of article 5539a.¹⁵²

VIII. PARTIES

In three cases decided during the survey period, courts held that a litigant waives his objection to a defect in the parties by failing to assert the objection at the trial court level. For example, in *Realtex Corp. v. Tyler*¹⁵³ the court rejected appellee's contention that it should dismiss an appeal brought by the plaintiff corporation because the corporation's charter had been forfeited prior to the institution of suit for failure to pay the required franchise tax.¹⁵⁴ According to the court, the defendants waived the defect in parties by failing to raise an objection in the trial court to the plaintiff's capacity to bring the suit.¹⁵⁵

The remaining two cases involved nonjoinder of an alleged indispensa-

148. The court of appeals noted that no statute of limitations had been specifically pleaded by the driver of the car. *Id.* at 100 n.1. Thus, it appears that the trial court's selection of a two-year limitations period was based on TEX. REV. CIV. STAT. ANN. art. 5526, § 6 (Vernon Supp. 1982-1983).

149. 628 S.W.2d at 100.

150. *Id.* (citing *City of San Antonio v. Talerico*, 98 Tex. 151, 154, 81 S.W. 518, 520 (1904); *Sims v. Southland Corp.*, 503 S.W.2d 660, 663 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.)).

151. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1982-1983).

152. 628 S.W.2d at 101.

153. 627 S.W.2d 441 (Tex. Ct. App.—Houston [1st Dist.] 1981, no writ).

154. *Id.* at 442; see TEX. TAX CODE ANN. §§ 171.251, .301, .302, .309 (Vernon 1982) (forfeiture of corporate charter for failure to pay franchise taxes). If a corporation forfeits its charter for failure to pay franchise taxes, it loses the right to sue or defend in Texas courts. *Id.* § 171.252(1).

155. 627 S.W.2d at 442 (citing *Rimco Enters. Inc. v. Texas Elec. Serv. Co.*, 599 S.W.2d 362, 365 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); *Frazier v. Waco Bldg. Ass'n*, 61 S.W. 132, 134 (Tex. Civ. App.—1901, writ ref'd).

ble party. In both instances the Texas Supreme Court held that the absence of the indispensable party did not require reversal of the trial court's judgment because the defect in parties was raised for the first time on appeal.¹⁵⁶ The plaintiff in *Cox v. Johnson*¹⁵⁷ sued to recover on a promissory note the defendant had executed, but failed to join as an additional plaintiff the joint payee on the note. Relying on the supreme court's decision in *Petroleum Anchor Equipment v. Tyra*,¹⁵⁸ the court of appeals reversed the judgment in favor of the plaintiff, holding that the trial court had committed fundamental error by proceeding to trial in the absence of an indispensable party to the lawsuit.¹⁵⁹ In a per curiam opinion refusing the plaintiff's application for writ of error, the supreme court expressly disapproved the appellate court's reasoning.¹⁶⁰ The court explained that "[f]undamental . . . error is a discredited doctrine" that survives today only in those rare instances in which the record shows on its face that the court lacked jurisdiction or the public interest was directly and adversely affected.¹⁶¹ Consequently, the plaintiff's failure to join the indispensable party did not require reversal of the judgment¹⁶² since the defendant had not raised the error in the trial court below, and the absence of an indispensable party-plaintiff did not amount to fundamental error.¹⁶³ Similarly, in *Pirtle v. Gregory*,¹⁶⁴ in which the defendant also raised the issue of nonjoinder for the first time on appeal, the court refused to find that the absence of an indispensable party-defendant from the suit constituted fundamental error.¹⁶⁵ Reconfirming the view it expressed in *Cooper v. Texas Gulf Industries, Inc.*¹⁶⁶ some eight years earlier, the court opined: "Under the provisions of our present Rule 39 it would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined."¹⁶⁷

156. *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982) (per curiam); *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam).

157. 638 S.W.2d 867 (Tex. 1982) (per curiam).

158. 406 S.W.2d 891 (Tex. 1966).

159. 630 S.W.2d 492, 493 (Tex. Ct. App.—Corpus Christi 1982).

160. 638 S.W.2d at 867-68. The court of appeals had also cited as support its own holding in *Hinojosa v. Love*, 496 S.W.2d 224 (Tex. Civ. App.—Corpus Christi 1973, no writ). *Id.* The supreme court also expressly disapproved that holding. 638 S.W.2d at 868.

161. 638 S.W.2d at 868 (citing *Texas Indus. League v. Railway Comm'n*, 633 S.W.2d 821 (Tex. 1982); *Buckholts Indep. School Dist. v. Glaser*, 632 S.W.2d 146 (Tex. 1982); *Pirtle v. Gregory*, 629 S.W.2d 919 (Tex. 1982) (per curiam)).

162. 638 S.W.2d at 868. The court refused to grant the writ of error, however, and upheld the judgment of the court of appeals on other grounds. *Id.*

163. *Id.* The court distinguished its prior holding in *Tyra* as being decided prior to the date that amendments to the Texas Rules of Civil Procedure changed "our approach in dealing with a defect of parties from one which emphasized jurisdiction to an approach based solely upon pragmatic considerations." *Id.*

164. 629 S.W.2d 919 (Tex. 1982) (per curiam).

165. *Id.* at 920.

166. 513 S.W.2d 200 (Tex. 1974).

167. 629 S.W.2d at 920 (quoting *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 204 (Tex. 1974)).

Underscoring the effect of the 1977 amendments to rule 42,¹⁶⁸ the court in *Atkinson v. Reid*¹⁶⁹ held that a shareholder-plaintiff bringing a derivative action against a corporation was not required to satisfy the prerequisites of rule 42;¹⁷⁰ rather, a plaintiff in a derivative suit need satisfy only the requirements of article 5.14(B) of the Texas Business Corporation Act.¹⁷¹

Rule 42 was again the subject of judicial scrutiny in *Amoco Production Co. v. Hardy*.¹⁷² The court focused specifically on subsection (b)(4) of the rule, which provides, in part, that a case may be certified as a class action if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."¹⁷³ Pursuant to rule 42(b)(4) the trial court had certified as a class action a suit brought by ten named plaintiffs against several oil companies to recover royalties under various oil and gas leases.¹⁷⁴ On appeal from the order of certification the defendants argued that the plaintiffs did not show that questions of law or fact common to the class would predominate over the individual questions involved in the suit. The court of appeals agreed and ruled that the predominant questions posed by the plaintiffs' claim affected class members individually, rather than the class as a whole, because the class defined by the trial court consisted of over 2,000 persons holding interests in an almost equal number of separate leases.¹⁷⁵ Acknowledging that the abuse of discretion standard governed its review of the trial court's order certifying the class,¹⁷⁶ the court of appeals concluded that the lower court had abused its discretion by failing to apply rule 42(b)(4) properly to the substantially undisputed facts of the case.¹⁷⁷

IX. DISCOVERY

The topic of discovery sanctions proved to be fertile ground for judicial decisionmaking during the survey period, producing a harvest of cases. In two of those cases the courts considered the propriety of entering a default

168. TEX. R. CIV. P. 42. Prior to 1977, rule 42 expressly applied to derivative suits. TEX. R. CIV. P. 42 (Vernon 1975); see Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 29 SW. L.J. 265, 272 (1975).

169. 625 S.W.2d 64 (Tex. Ct. App.—San Antonio 1981, no writ).

170. *Id.* at 67; accord *Zauber v. Murray Sav. Ass'n*, 591 S.W.2d 932, 935 (Tex. Civ. App.—Dallas 1979), writ *ref'd n.r.e. per curiam*, 601 S.W.2d 940 (Tex. 1980), discussed in Folladori, *Corporations and Partnerships, Annual Survey of Texas Law*, 35 SW. L.J. 225, 234 (1981).

171. 625 S.W.2d at 67; see TEX. BUS. CORP. ACT ANN. art. 5.14(B) (Vernon 1980).

172. 628 S.W.2d 813 (Tex. Ct. App.—Corpus Christi 1981, writ *dism'd*).

173. TEX. R. CIV. P. 42(b)(4).

174. 628 S.W.2d at 814-15.

175. *Id.* at 817.

176. *Id.* at 816 (citing *Townplace Homeowners' Ass'n, Inc. v. McMahon*, 594 S.W.2d 172 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ *ref'd n.r.e.*)).

177. 628 S.W.2d at 816. A trial judge abuses his discretion when he fails to apply the law to substantially undisputed facts. See *Camp v. Shannon*, 162 Tex. 515, 518, 348 S.W.2d 517, 519 (1961); *Birds Constr., Inc. v. Gonzalez*, 595 S.W.2d 926, 929 (Tex. Civ. App.—Corpus Christi 1981, no writ).

judgment against the defendant as a sanction for his failure to answer interrogatories. In *Bass v. Duffey*¹⁷⁸ the appellate court approved the trial court's action in striking the defendant's pleadings and rendering a default judgment, even though answers to the interrogatories were on file at the time the trial court rendered the judgment.¹⁷⁹ According to the court, the imposition of penalties or sanctions for failure or refusal of a party to comply with the interrogatory rule¹⁸⁰ is a matter directed to the sound discretion of the trial court, and such imposition can be set aside only upon a showing of clear abuse of discretion.¹⁸¹ Although the defendant finally submitted answers to the interrogatories after the plaintiff had filed its third motion for sanctions,¹⁸² the appellate court was not surprised that the trial court eventually imposed the sanction of a default judgment.¹⁸³ Noting that the defendant did not once attempt to respond to the interrogatories or request additional time before the due date for filing answers, but instead did nothing until faced with the threat of sanctions, the court held that the trial court's action did not constitute an abuse of discretion.¹⁸⁴

To similar effect was the decision in *Pearson Corp. v. Wichita Falls Boys Club Alumni Association, Inc.*¹⁸⁵ Following the defendant's failure to answer interrogatories within the requested period of time, the plaintiff filed a motion to compel answers. After due notice and hearing the court granted the plaintiff's motion and ordered the defendant to respond to the interrogatories. Several months later the interrogatories were still unanswered, so the trial court, without further notice or a second hearing, rendered a default judgment against the defendant.¹⁸⁶ On appeal, the defendant complained that the trial court had abused its discretion by rendering the default judgment without a second hearing. Characterizing the recalcitrance exhibited by the defendant as "startling," the court of appeals rejected the defendant's contention and held that the trial court was empowered to impose the severe sanctions of rule 215a¹⁸⁷ because the defend-

178. 620 S.W.2d 847 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

179. *Id.* at 849.

180. TEX. R. CIV. P. 168.

181. 620 S.W.2d at 849 (citing *Meyer v. Trunks*, 360 S.W.2d 518 (Tex. 1962); *Young Cos. v. Bayou Corp.*, 545 S.W.2d 901, 902 (Tex. Civ. App.—Beaumont 1977, no writ)).

182. After a hearing on each of the two prior motions for sanctions, the court ordered the defendant to answer the remaining interrogatories within a specified period of time; however, the defendant failed to comply with the court's directive on both occasions, thus prompting the third motion. 620 S.W.2d at 848. The answers finally filed were substantially incomplete and unresponsive. *Id.* at 849.

183. *Id.*

184. *Id.* The court distinguished the contrary holdings in *Illinois Employer's Ins. Co. v. Lewis*, 582 S.W.2d 242 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e. per curiam*, 590 S.W.2d 119 (Tex. 1979), and *Young Cos. v. Bayou Corp.*, 545 S.W.2d 901 (Tex. Civ. App.—Beaumont 1977, no writ), observing that the answers the defendant finally filed in those cases were complete, and neither of the cases involved similar circumstances existing up to the time sanctions were imposed. 620 S.W.2d at 849.

185. 633 S.W.2d 684 (Tex. Ct. App.—Fort Worth 1982, no writ).

186. *Id.* at 685. In granting the earlier motion to compel, however, the court said that plaintiff would be entitled to a default judgment if the defendant did not comply with the terms of the order. *Id.*

187. TEX. R. CIV. P. 215a(c) permits the court, on motion and notice, to render a default

ant had wholly failed to answer any of the interrogatories the plaintiff had propounded.¹⁸⁸ The appellate court noted that if a party answers some interrogatories, an order compelling further answers is a necessary predicate to the imposition of sanctions.¹⁸⁹ If a party completely fails to answer interrogatories, however, the propounding party may immediately move for imposition of sanctions without first obtaining an order from the court requiring answers to the interrogatories.¹⁹⁰ According to the appellate court, therefore, the trial judge was authorized to render the default judgment as early as the first hearing because the defendant failed to make any response to the interrogatories.¹⁹¹ Moreover, the defendant could not later complain about the timing of the court's judgment, which had simply been postponed to afford the defendant an additional opportunity to serve answers.¹⁹² As in *Bass*, however, the decision in *Pearson Corp.* reversed the portion of the judgment specifying an amount for damages.¹⁹³ In each instance, the court held that the defendant was at least entitled to notice and a hearing on the issue of damages since the plaintiff's claim was unliquidated.¹⁹⁴

The courts upheld a different type of discovery sanction in *Duncan v. Cessna Aircraft Co.*¹⁹⁵ and *Texas Industries, Inc. v. Lucas*.¹⁹⁶ In both cases a party's failure to disclose the identity of an expert witness in response to interrogatories resulted in the exclusion of that witness's testimony at trial. The problem arose in *Duncan* when in mid-trial the plaintiff tendered the testimony of an expert witness who had not previously been identified in response to defendant's pretrial interrogatories. The trial court postponed the expert's testimony over the weekend to allow the defendant's attorneys to depose him. When the trial resumed, the court allowed the plaintiff to read portions of the expert's deposition into evidence over the objection of the defendant.

On appeal, the court of appeals noted that, prior to its amendment, rule 168 did not provide specific sanctions for a party's failure to identify a witness in answers to interrogatories requesting names of witnesses to be

judgment against a party that fails to serve answers to interrogatories after proper service of such interrogatories. Other sanctions imposed by the rule include dismissal, striking the pleading, or otherwise precluding the offending party from showing grounds for relief or defense. *Id.*

188. 633 S.W.2d at 686.

189. *Id.* at 687; see *Saldivar v. Facit-Addo, Inc.*, 620 S.W.2d 778, 779 (Tex. Civ. App.—El Paso 1981, no writ) (citing *Lewis v. Illinois Employers Ins. Co.*, 590 S.W.2d 119 (Tex. 1979), for the rule that "if some interrogatory answers are filed, a motion to compel answers is . . . required to impose sanctions under . . . Rule 168." 620 S.W.2d at 779).

190. 633 S.W.2d at 686; see TEX. R. CIV. P. 168; *Lewis v. Illinois Employers Ins. Co.*, 582 S.W.2d 242 (Tex. Civ. App.—Beaumont), writ *ref'd n.r.e. per curiam*, 590 S.W.2d 119 (Tex. 1979); *Southern Pac. Transp. Co. v. Evans*, 590 S.W.2d 515 (Tex. Civ. App.—Houston [1st Dist.] 1979), cert. denied, 449 U.S. 994 (1980).

191. 633 S.W.2d at 685-86.

192. *Id.* at 686-87 (by implication).

193. *Id.* at 687.

194. *Id.*; *Bass*, 620 S.W.2d at 849-50.

195. 632 S.W.2d 375 (Tex. Ct. App.—Austin 1982, writ granted).

196. 634 S.W.2d 748 (Tex. Ct. App.—Houston [14th Dist.] 1982, no writ).

called at trial.¹⁹⁷ The court, nevertheless, elected to follow recent Texas decisions that have recognized the exclusion of the witness's testimony as an appropriate sanction.¹⁹⁸ Although the court admitted that an aggrieved party can be required to take such steps as deposing the witness to alleviate the surprise resulting from the offer of an undisclosed expert witness's testimony,¹⁹⁹ it concluded that the allowance of a weekend deposition during a recess in the trial was an insufficient measure to minimize the problems resulting from admission of the expert's testimony.²⁰⁰ Accordingly, the court held that the district court's admission of the expert's testimony constituted an abuse of discretion.²⁰¹

In *Texas Industries* the trial court had likewise admitted testimony from an expert witness whose identity the plaintiff had not previously disclosed in response to the defendant's interrogatories.²⁰² Once again the trial court had attempted to ease the burden on the defendant as a result of the surprise testimony by allowing him to depose the witness for two hours the night prior to his testimony. But unlike the situation in *Duncan*, the amended version of rule 168²⁰³ governed the appeal in *Texas Industries* and thus the appellate court found it unnecessary to attempt a balancing of the parties' interests. Instead, the court simply held that the trial court had abused its discretion since the testimony was admitted in direct contravention of the rule 168 mandate.²⁰⁴ Although the court observed that rule 168 allows the testimony to be admitted for good cause, it ruled that the plaintiff had failed to show a compelling reason sufficient to require admission of the expert's testimony.²⁰⁵

197. 632 S.W.2d at 385 n.8; see TEX. R. CIV. P. 168. Although the amendments to rule 168 became effective on Jan. 1, 1981, the trial of the case apparently occurred earlier, and the old version of the rule governed. The court noted, however, that under the amended version of the rule, the witness would not have been allowed to testify since he was not named in response to the defendant's interrogatories, and his identity was not disclosed at least 14 days prior to trial. 632 S.W.2d at 385 n.8; see TEX. R. CIV. P. 168(7)(a)(3).

198. See *Texas Employers' Ins. Ass'n v. Meyer*, 620 S.W.2d 179 (Tex. Civ. App.—Waco 1981, no writ), discussed in Figari, 1982 *Annual Survey*, *supra* note 11, at 456; *Trubell v. Patten*, 582 S.W.2d 606, 611 (Tex. Civ. App.—Tyler 1979, no writ), discussed in Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 34 Sw. L.J. 415, 431-32 (1980).

199. 632 S.W.2d at 385 (citing *Allied Fin. Co. v. Garza*, 626 S.W.2d 120, 124 (Tex. Civ. App.—Corpus Christi 1981, no writ)).

200. 632 S.W.2d at 386.

201. *Id.* The court also noted that federal courts have excluded testimony as a sanction for violation of FED. R. CIV. P. 26(b)(4), which also permits discovery of the identity of experts a party expects to call as trial witnesses. 632 S.W.2d at 385 n.9; see, e.g., *Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980); *Shelak v. White Motor Co.*, 581 F.2d 1155, 1157-60 (5th Cir. 1978).

202. 634 S.W.2d at 757.

203. TEX. R. CIV. P. 168(7)(a)(3) now provides:

[I]f the party expects to call an expert witness whose name and the subject matter of such witness' testimony has not been previously disclosed in response to an appropriate interrogatory, such answer must be amended . . . as soon as practical, but in no event less than fourteen (14) days prior to the beginning of trial except on leave of court. If such amendment is not timely made, the testimony of the witness shall not be admitted in evidence unless the trial court finds that good cause sufficient to require its admission exists.

204. 634 S.W.2d at 758; see TEX. R. CIV. P. 168.

205. 634 S.W.2d at 758.

Postjudgment discovery sanctions were the subject of *Arndt v. Farris*.²⁰⁶ Rule 621a, which governs postjudgment discovery, provides, in part, that a party obtaining a judgment may "initiate and maintain in the trial court in the same suit in which said judgment was rendered any discovery proceeding authorized by these rules for pretrial matters."²⁰⁷ Pursuant to rules 621a and 215a the trial court in *Arndt* imposed severe sanctions on the defendant, including holding him in contempt of court, for his failure to appear at a postjudgment deposition.²⁰⁸ In a mandamus proceeding seeking to vacate the order imposing sanctions, the defendant claimed that the trial court did not have jurisdiction to enter the order because the plaintiff had failed to file a new petition. The supreme court held, however, that rule 621a does not require a new petition as a predicate for initiating discovery or seeking sanctions after judgment, and the defendant's application for a writ of mandamus was therefore denied.²⁰⁹ Recognizing that a trial court's power to vacate, modify, correct, or reform a judgment ceases thirty days after the judgment is signed,²¹⁰ the supreme court nevertheless concluded that the trial court's power to enforce its judgment is not so limited.²¹¹ According to the court, rule 621a is an aid to the enforcement of judgments, and the "trial court has continuing jurisdiction over such matters as set forth in the rule."²¹²

Two cases during the survey period discussed the scope of the attorney-client privilege in the context of the discovery process. Shortly after an accident that was the subject of suit, the defendant in *Hiebert v. Weiss*²¹³ made an oral statement to an investigator employed by the defendant's insurance company. The statement, which the investigator had recorded, was subsequently transcribed, and the insurance company forwarded a copy of the statement to the attorney it had furnished for the defendant.²¹⁴ When the plaintiff sought to introduce the statement at trial, the trial court refused to admit it in evidence. On appeal the plaintiff claimed that the trial court's exclusion of the statement was improper because it constituted a prior inconsistent statement by the defendant. The appellate court, however, ruled that the statement was not a proper object of discovery because it constituted "privileged matter identical to the privilege which would have existed had it been a statement initially given to an attorney [the defendant] had himself later employed."²¹⁵ According to the court, the defendant was entitled to the protection of rules 167 and 186a since the

206. 633 S.W.2d 497 (Tex. 1982).

207. TEX. R. CIV. P. 621a.

208. 633 S.W.2d at 498; see TEX. R. CIV. P. 215a, 621a.

209. 633 S.W.2d at 498.

210. TEX. R. CIV. P. 329b.

211. 633 S.W.2d at 499; see *Ex parte Gorena*, 595 S.W.2d 841, 844 (Tex. 1979); *Hunt Prod. Co. v. Burrage*, 104 S.W.2d 84, 86 (Tex. Civ. App.—Dallas 1937, writ diss'd).

212. 633 S.W.2d at 499.

213. 622 S.W.2d 150 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

214. Under the terms of the defendant's insurance policy, the insurance company was obligated to and did provide counsel for the defendant.

215. 622 S.W.2d at 152; see also *Gass v. Baggerly*, 332 S.W.2d 426, 430 (Tex. Civ. App.—Dallas 1960, no writ).

insurance company that obtained the statement from the defendant was also obligated to provide counsel for the defendant.²¹⁶

In *Bendele v. Tri-County Farmer's Co-op*²¹⁷ the question presented was "whether a party waives his attorney-client privilege when he complies without objection to a pre-trial order requiring the production of privileged matter."²¹⁸ Prior to trial the appellee in *Bendele* produced certain privileged documents in compliance with an order compelling production pursuant to a subpoena duces tecum. The appellee did not move to quash the subpoena, file a motion for protective order alleging the attorney-client privilege, or object to evidence from the documents until the trial.²¹⁹ The appellate court held that under these circumstances the attorney-client privilege was waived.²²⁰

In *Couch v. Mallory*²²¹ the trial court permitted the plaintiffs to use depositions in a plea of privilege hearing that had been taken before one of the defendants was joined as a party. The Corpus Christi court of appeals found this ruling to be in error and refused to consider the depositions on appeal in reviewing the proper venue of the action against the defendant who was joined after the taking of the depositions.²²²

Finally, in *Carbonit Houston, Inc. v. Exchange Bank*²²³ the court held that an answer to a request for admission²²⁴ that volunteers an unresponsive explanation constitutes surplusage and is not evidence binding on the requesting party.²²⁵ Further, the court reaffirmed that one defendant's admissions are not legally admissible against any other defendant.²²⁶

X. SUMMARY JUDGMENT

A number of decisions during the survey period discussed the types of proof that will support or defeat a motion for summary judgment. Attempting to collect on a promissory note, the movant in *Bailey v. Gulfway National Bank*²²⁷ attached an unverified copy of the note to the maker's

216. 622 S.W.2d at 152; see TEX. R. CIV. P. 167, 186a. The court apparently concluded that the statement therefore constituted a communication to an agent of the defendant made after the occurrence upon which the suit was based.

217. 635 S.W.2d 459, 464 (Tex. Ct. App.—San Antonio), *aff'd in part and rev'd in part on other grounds*, 641 S.W.2d 208 (Tex. 1982).

218. 635 S.W.2d at 464.

219. *Id.*

220. *Id.*

221. 638 S.W.2d 179 (Tex. Ct. App.—Corpus Christi 1982, writ dismissed).

222. See also *Elizondo v. Tavarez*, 596 S.W.2d 667, 670 (Tex. Civ. App.—Corpus Christi 1980, writ refused n.r.e.); *Heldt Bros. Trucks v. Silva*, 464 S.W.2d 931, 937 (Tex. Civ. App.—Corpus Christi 1971, no writ).

223. 628 S.W.2d 826 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ refused n.r.e.).

224. See TEX. R. CIV. P. 169.

225. 628 S.W.2d at 829; see also *Halbert v. Sylvestine*, 292 S.W.2d 135 (Tex. Civ. App.—Beaumont 1956, no writ); *Mosby v. Texas & Pac. Ry.*, 191 S.W.2d 55, 58 (Tex. Civ. App.—El Paso 1945, writ refused w.o.m.).

226. 628 S.W.2d at 829 (citing *Bryant v. Kimmons*, 430 S.W.2d 73, 76 (Tex. Civ. App.—Austin 1968, no writ)).

227. 626 S.W.2d 70 (Tex. Ct. App.—Corpus Christi 1981, writ refused n.r.e.).

deposition, pursuant to an agreement of the parties.²²⁸ On appeal, the maker of the note complained that no evidence existed showing that the note was owned by the party who obtained a summary judgment in the trial court. The court held that the maker had waived the point based on his failure to object about this matter in the trial court,²²⁹ and the admissions he made during his deposition, including the parties' agreement to allow attachment of a copy of the note.²³⁰

In an action to collect on a foreign judgment the nonmovant in *Dousson v. Disch*²³¹ claimed that summary judgment should not have been entered because the certified copy of the foreign judgment, although filed, was not attached to the motion. Although recognizing that rule 166-A(e) requires "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit [to] be attached thereto,"²³² the appellate court found no provision in the rule that "requires summary judgment evidence to be attached to the motion for summary judgment."²³³ Accordingly, the court found the nonmovant's argument to be without merit.²³⁴ *Land Liquidators of Texas, Inc. v. Houston Post Co.*²³⁵ held that an affidavit required to support a summary judgment must be made on the personal knowledge of the affiant and, pursuant to rule 166-A(e), "must show affirmatively that the affiant is competent to testify to the matters stated therein."²³⁶ Moreover, the affidavit must not merely state that the affiant is competent to testify to the matters stated in the affidavit, but "there must be something in the affidavit to show affirmatively *how* the affiant is competent to testify on" those matters.²³⁷ Finding neither requirement satisfied in this case, the appellate court reversed a summary judgment against the appellant.²³⁸ Fi-

228. *Id.* at 72.

229. *Id.* TEX. R. CIV. P. 166-A(c), which governs summary judgment practice, provides, in part, that "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." See also *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671 (Tex. 1979) (nonmovant's agreement to submission of motion for summary judgment on single issue precluded nonmovant from later urging on appeal an issue not presented at trial court level). The court in *Bailey* also noted:

Where unverified or uncertified copies are attached to pleadings on a motion for summary judgment and no exception is taken, the party thereby waives the requirement under Rule 166-A(e) and the copies are sufficient basis to grant a motion for summary judgment when it fairly appears there is no genuine issue as to a material fact and the moving party is entitled to a judgment as a matter of law.

626 S.W.2d at 72.

230. 626 S.W.2d at 73; see also 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.2611 (rev. 1971).

231. 629 S.W.2d 111 (Tex. Ct. App.—Dallas 1981, no writ).

232. TEX. R. CIV. P. 166-A(e).

233. 629 S.W.2d at 112. But see *Corpus Christi Mun. Gas Corp. v. Tuloso-Midway Indep. School Dist.*, 595 S.W.2d 203 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

234. 629 S.W.2d at 112.

235. 630 S.W.2d 713 (Tex. Ct. App.—Houston [14th Dist.] 1982, no writ).

236. *Id.* at 714; see TEX. R. CIV. P. 166-A(e).

237. 630 S.W.2d at 714 (emphasis added).

238. *Id.* at 715.

nally, the court in *Denton Construction Co. v. Mike's Electric Co.*²³⁹ recognized a proposition that is often overlooked by the trial practitioner: A party upon whom a request for admission has been served may not affirmatively use his response to the request to defeat a motion for summary judgment.²⁴⁰

Rule 166-A(c)²⁴¹ provides that a party opposing a summary judgment may file and serve opposing affidavits or other written response "not later than seven days prior to the day of hearing."²⁴² In *Small v. Harper*²⁴³ the opposing party filed an affidavit on the day of the summary judgment hearing without obtaining the court's prior permission.²⁴⁴ Recognizing that the trial court had the discretion to consider the belated affidavit,²⁴⁵ the appellate court concluded that the affidavit had been taken into account in ruling on the motion because the lower court's judgment contained the following recitation: "*having considered all of the pleadings and summary judgment evidence adduced in support of and in opposition to said Motion . . .*"²⁴⁶ Thus, the appellate court held the affidavit was part of the summary judgment record and demonstrated a genuine issue of fact, which precluded the granting of a summary judgment.²⁴⁷

The decision in *Copy Service, Inc. v. Bob Hamric Chevrolet, Inc.*²⁴⁸ considered the presumption of a final judgment in the context of a motion for summary judgment. On appeal from the entry of a favorable summary judgment the appellee claimed that the appellate court lacked jurisdiction because the trial court's judgment was not final in light of a pending cross-action the appellant had filed, which had not been disposed of in the trial court. Relying on earlier case authority, however, the appellate court concluded that if the trial court renders a judgment, not intrinsically interlocutory in character, and fails to order a separate trial under rule 174,²⁴⁹ then "it will be presumed for all appeal purposes that the [trial] court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties."²⁵⁰ Finding the presumption to be applicable, the court considered the merits of the appeal.

239. 621 S.W.2d 846 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

240. *Id.* at 848; *accord* *Americana Motel, Inc. v. Johnson*, 610 S.W.2d 143 (Tex. 1980); *Oliver v. Allstate Ins. Co.*, 456 S.W.2d 558, 560 (Tex. Civ. App.—Dallas 1970, writ dism'd w.o.j.).

241. TEX. R. CIV. P. 166-A(c).

242. *Id.*

243. 638 S.W.2d 24 (Tex. Ct. App.—Houston [1st Dist.] 1982, no writ).

244. *Id.* at 28.

245. *Id.*; *see* *Majestic Bldg. Corp. v. McClelland*, 559 S.W.2d 883 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Metze v. Entman*, 584 S.W.2d 512 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

246. 638 S.W.2d at 29 (emphasis in original).

247. *Id.* at 30.

248. 629 S.W.2d 169 (Tex. Ct. App.—Waco 1982, no writ).

249. TEX. R. CIV. P. 174.

250. 629 S.W.2d at 172 (quoting *North East Indep. School Dist. v. Aldridge*, 400 S.W.2d 893, 897-98 (Tex. 1966)).

XI. SPECIAL ISSUE SUBMISSION

A number of decisions during the survey period focused on the scope of submission of special issues under rule 277,²⁵¹ which abolished the former requirement that special issues be submitted distinctly and separately.²⁵² Rule 277 now provides that "[i]t shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly [and] [i]t shall not be objectionable that a question is general or includes a combination of elements or issues."²⁵³ Giving this language full effect, a number of earlier cases had opened the door to a broadened use of special issues.²⁵⁴ The action of the trial court in *Montgomery Ward & Co. v. Hernandez*,²⁵⁵ however, seems to have torn the door from its hinges. In *Hernandez*, a false imprisonment case, the trial court virtually submitted the plaintiff's entire cause of action in a single issue inquiring: "What amount of money, if any, . . . do you find from a preponderance of the evidence would reasonably compensate [plaintiff] for damages directly resulting from the false imprisonment, if any, on the occasion in question," followed by an instruction on damages and a definition of "false imprisonment."²⁵⁶ While acknowledging that rule 277 encourages the use of broad special issues, the court of appeals nevertheless interpreted the submission as assuming the controverted fact of false imprisonment, apparently because it tended to direct the jury's attention solely to the question of damages.²⁵⁷ Furthermore, since the accompanying definition failed to include one of the contested elements of false imprisonment, the appellate court found that the jury had been foreclosed from deciding an omitted issue.²⁵⁸

Under former practice the trial judge was required to frame his charge so that he did "not therein comment on the weight of the evidence."²⁵⁹ The 1973 amendments to the Texas Rules of Civil Procedure deleted this phrase,²⁶⁰ and the rules now only prohibit the trial judge from comment-

251. TEX. R. CIV. P. 277.

252. See Tex R. Civ. P. 277 (Vernon 1967). See generally *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922).

253. TEX. R. CIV. P. 277; see Pope & Lowerre, *The State of the Special Verdict—1979*, 11 ST. MARY'S L.J. 1 (1979); Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577 (1973).

254. See, e.g., *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 924 (Tex. 1981) (broad submission of negligence issue upheld); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980) (reiterated purpose of 1973 amendment to rule 277 was to abolish "separate and distinct" requirement in issue submission); *Siebenlist v. Harville*, 596 S.W.2d 113, 114-15 (Tex. 1980); *Gray v. West*, 608 S.W.2d 771, 775-76 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.); *Del Monte Corp. v. Martin*, 574 S.W.2d 597 (Tex. Civ. App.—San Antonio 1978, no writ); *Members Mut. Ins. Co. v. Muckelroy*, 523 S.W.2d 77, 82 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.); *Shasteen v. Mid-Continent Ref. Co.*, 517 S.W.2d 437, 439 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

255. 644 S.W.2d 758 (Tex. Ct. App.—Corpus Christi 1982, writ granted).

256. *Id.* at 760.

257. *Id.* at 761.

258. *Id.* at 760.

259. TEX. R. CIV. P. 272 (Vernon 1967).

260. TEX. R. CIV. P. 272; see *Civil Procedure Rules Amended*, 36 TEX. B.J. 495 (1973).

ing directly on the weight of the evidence.²⁶¹ Considering a special issue asking the jury to determine "[w]hose negligence, if any, . . . caused the incident," followed by a list of the parties inquired about, the court in *Hersh v. Hendley*²⁶² ruled that the inclusion of the words "if any" prevented the submission from being a direct comment on the weight of the evidence.²⁶³

With respect to the requirements for making objections to the court's charge, rule 272 stipulates that "objections shall in every instance be presented to the court in writing [and] [a]ll objections not so presented shall be considered as waived."²⁶⁴ Despite the further statement in the rule that "[t]he judge shall announce his rulings thereon before reading the charge to the jury,"²⁶⁵ *Williams v. Meyer*²⁶⁶ indicates that the burden is on the objecting counsel to insure that such ruling is made at that time and is included in the record.²⁶⁷ In *Williams*, when counsel for the defendant had concluded his objections to the charge, the trial court replied "I'll let you know at 1:15," but the record failed to reflect that the trial court had ever acted on the objection before reading the charge to the jury. Concluding that counsel had failed to make the requisite showing under rule 272, the court found the objections to have been waived.²⁶⁸

XII. JURY PRACTICE

Rule 216 requires that a jury demand be made, and the jury fee be paid "on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the nonjury docket, but not less than ten days in advance."²⁶⁹ Notwithstanding the mandatory nature of this ten-day limit, Texas courts have construed the rule as being discretionary with the trial court.²⁷⁰ Following these prior decisions, the court in *Dawson v. Jarvis*²⁷¹ held that a denial of a late fee payment will be sustained on appeal unless the complaining party shows "(1) that the granting of the late request would not interfere with the orderly handling of the court's docket, (2) delay the trial of the case, or (3) operate to the injury of the opposite party."²⁷² Finding that each of these criteria had been satisfied, the appel-

261. TEX. R. CIV. P. 277.

262. 626 S.W.2d 151 (Tex. Civ. App.—Fort Worth 1981, no writ).

263. *Id.* at 155.

264. TEX. R. CIV. P. 272.

265. *Id.*

266. 629 S.W.2d 257 (Tex. Ct. App.—Waco 1982, writ ref'd n.r.e.).

267. *Id.* at 259; *accord* Texas Employers' Ins. Ass'n v. Clapper, 605 S.W.2d 938, 940 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); Reliance Ins. Co. v. Dahlstrom Corp., 568 S.W.2d 733, 734 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

268. 629 S.W.2d at 259.

269. TEX. R. CIV. P. 216.

270. *See, e.g.*, Gallagher v. Joyce, 459 S.W.2d 221 (Tex. Civ. App.—Corpus Christi 1970, writ ref'd n.r.e.); First Bankers Ins. Co. v. Lockwood, 417 S.W.2d 738 (Tex. Civ. App.—Amarillo 1967, no writ); Lebman v. Sullivan, 198 S.W.2d 280 (Tex. Civ. App.—San Antonio 1946, writ ref'd n.r.e.).

271. 627 S.W.2d 444 (Tex. Ct. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

272. *Id.* at 446-47.

late court determined that the trial court had abused its discretion by denying a jury trial to the defendants, who had offered to pay the jury fee on the day of the trial.²⁷³

A significant supreme court decision on jury misconduct is *Flores v. Doshier*.²⁷⁴ In this medical malpractice case plaintiffs moved for a new trial on the basis of a statement made by one or more jurors that it did not matter how the jury answered a special issue inquiring whether the doctor's negligence was a proximate cause of the patient's death "because plaintiffs would recover in any event."²⁷⁵ In order to establish sufficient grounds for a new trial for jury misconduct the court recognized that the plaintiffs must establish "(1) that misconduct occurred; (2) that it was material misconduct and (3) that based on the record as a whole, the misconduct probably resulted in harm to them."²⁷⁶ Based on the testimony of two jurors who had changed their votes after hearing the statements, the supreme court concluded that the standard had been met and, accordingly, ordered a new trial.²⁷⁷

A number of decisions addressed the propriety of certain types of statements made in closing arguments in a jury trial. In *Texas General Indemnity Co. v. Moreno*,²⁷⁸ a workmen's compensation case, the defendant complained about two statements the plaintiff's counsel had made in his closing argument. First, the plaintiff's counsel had implied that the defendant should have "taken the money the legislature had provided for this man and paid it to him rather than paying this [defendant's] lawyer to sit over here."²⁷⁹ The second argument effectively stated that the defendant had not paid the benefits because the money had been invested and loaned out "at 22 percent."²⁸⁰ Finding that the defendant's counsel had invited the first argument by making similar arguments and that the second argument was harmless, the appellate court refused to grant a new trial on the ground of improper jury argument.²⁸¹

In another workers' compensation case, *American Home Assurance Co. v. Coronado*,²⁸² the plaintiff's attorney attacked the defendant and his counsel for failing to produce their doctors' medical testimony and challenged the jury to conclude from their absence that had they appeared and testified, they could have provided evidence adverse to defendant. Concluding that the argument complained of was curable, the appellate court held that the defendant had waived any error by his failure to object and

273. *Id.* at 447.

274. 622 S.W.2d 573 (Tex. 1981).

275. *Id.* at 574.

276. *Id.*; accord *Strange v. Treasure City*, 608 S.W.2d 604 (Tex. 1980); *Fountain v. Ferguson*, 441 S.W.2d 506 (Tex. 1969).

277. 622 S.W.2d at 575.

278. 638 S.W.2d 908 (Tex. Ct. App.—Houston [1st Dist.] 1982, no writ).

279. *Id.* at 912.

280. *Id.* at 913.

281. *Id.*

282. 628 S.W.2d 818 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).

request an instruction for the jury to disregard the statements.²⁸³

Finally, in *Missouri Valley, Inc. v. Putman*²⁸⁴ an employee's widow and children sought exemplary damages from an employer for its gross negligence in removing a rope barricade around a floor opening, which caused the employee to fall to his death through the opening. In closing argument the widow's attorney exhibited a rope and hangman's noose to the jury. Concluding that the trial court's denial of a new trial was not an abuse of discretion, the court ruled that the widow's counsel had not "hung" himself by displaying the hangman's noose to the jury.²⁸⁵

During the survey period two decisions considered issues relating to the jury selection process. In *Garcia v. Texas Employers' Insurance Association*²⁸⁶ an unsuccessful workers' compensation claimant contended that he was denied a constitutionally representative jury in that the percentage of Mexican-Americans on the jury panels was far lower than the percentage of Mexican-Americans in the county of the suit. Recognizing that the process of selecting jury panels from voter registration lists by the use of jury wheels is constitutional unless it systematically and arbitrarily excludes a cognizable class,²⁸⁷ the court held that a showing that an identifiable group was underrepresented on the jury panel by as much as ten percent was not enough to prove purposeful discrimination based on race alone.²⁸⁸ Further, the claimant's testimony that the Texas Employers' Insurance Association purposely and systematically strikes all Mexican-Americans from jury panels was an insufficient basis for "the denial of the right, guaranteed by law, to preemptorily eliminate members of the panel for any reason that seems adequate to counsel in seeking a fair and impartial jury."²⁸⁹ In *Jenkins v. Chapman*²⁹⁰ an automobile accident case, the plaintiff's counsel, during voir dire, inquired as to whether any member of the panel had worked for an adjusting company. The court of appeals determined that such a question was not improper.²⁹¹ The same court also held that a juror's inability to read or write, which was discovered after trial, does not constitute reversible error, especially when the juror possesses an understanding of the English language.²⁹²

283. *Id.* at 824; *accord* *Otis Elevator Co. v. Wood*, 436 S.W.2d 324 (Tex. 1968).

284. 627 S.W.2d 829 (Tex. Ct. App.—Amarillo 1982, no writ).

285. *Id.* at 834.

286. 622 S.W.2d 626 (Tex. Ct. App.—Amarillo 1981, writ ref'd n.r.e.).

287. *Id.* at 630; *accord* *United States v. Ault*, 567 F.2d 1295, 1297 (5th Cir.), *cert. denied*, 436 U.S. 911 (1978).

288. 622 S.W.2d at 631; *see* *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965). The court also pointed out that the claimant had waived his challenge to the array of the jury panels by failing to file a verified motion before the trial on the merits. 622 S.W.2d at 630 n.3; *see* *TEX. R. Civ. P.* 221.

289. 622 S.W.2d at 631; *see* *Tamburello v. Welch*, 392 S.W.2d 114, 117 (Tex. 1965).

290. 636 S.W.2d 238 (Tex. Ct. App.—Texarkana 1982, writ *dism'd*).

291. *Id.* at 240.

292. *Id.*; *see* *Mitchell v. Burleson*, 466 S.W.2d 646 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.); *Coca Cola Bottling Co. v. Mitchell*, 423 S.W.2d 413 (Tex. Civ. App.—Corpus Christi 1967, no writ). *TEX. REV. CIV. STAT. ANN.* art. 2133 (Vernon Supp. 1982-1983) governs juror qualification and provides, as one of its requirements, that a juror must be able to read and write.

XIII. APPELLATE PROCEDURE

Rule 21c provides, in part, that an extension of time may be granted for the late filing of a transcript and statement of facts in the court of appeals if "a motion reasonably explaining the need therefor is filed within fifteen (15) days of the last date for filing."²⁹³ On the other hand, rule 386 provides, in effect, that the late filing of a transcript or statement of facts shall not affect the jurisdiction of the court of appeals.²⁹⁴ Resolving an apparent conflict between the two rules, the supreme court in *B.D. Click Co. v. Safari Drilling Corp.*²⁹⁵ held that a court of appeals did not have authority to grant a motion to extend the time for filing of the record in the absence of a timely rule 21c motion.²⁹⁶ Recognizing that rule 21c accomplishes "an important purpose by fixing the date a judgment becomes final," the court disapproved certain decisions that had held the fifteen-day time limit under rule 21c was not mandatory.²⁹⁷ Following the lead of *Click*, the court of appeals in *Carrao v. Committee of Unauthorized Practice of Law, State Bar of Texas*²⁹⁸ held that rule 21c also prohibits the appellate court from considering a motion for rehearing of a denial to extend the time for filing the record if the motion is not filed within the fifteen-day time limit.²⁹⁹

With respect to the preparation of a statement of facts by the court reporter, the supreme court in *Pat Walker & Co. v. Johnson*³⁰⁰ determined that a writ of mandamus could not be issued to compel the reporter to provide a statement of facts to a party.³⁰¹ Appealing from an order overruling a plea of privilege, the defendant in *Smith v. Sun-Belt Aviation, Ltd.*³⁰² attempted to obtain a statement of facts for the plea of privilege hearing. The statement of facts was unavailable because no court reporter was present during the hearing. Reversing the case for a new venue hearing, the court followed the rule that if "after the exercise of due diligence" a party "is unable to procure a statement of facts, his right to have the case reviewed on appeal can be preserved for him in no other way than by retrial of the cause."³⁰³

293. TEX. R. CIV. P. 21c. *Id.* 437 also provides, in part, that a court may not make "any enlargement of the time for filing transcript and statement of facts except pursuant to rule 21c."

294. TEX. R. CIV. P. 386.

295. 25 Tex. Sup. Ct. J. 346 (June 2, 1982).

296. *Id.* at 348; *accord In re Brazil*, 621 S.W.2d 811 (Tex. Civ. App.—Eastland 1981, no writ); *Briscoe v. Gulf Supply Co.*, 612 S.W.2d 88 (Tex. Civ. App.—Fort Worth 1981, writ *ref'd n.r.e.*).

297. 25 Tex. Sup. Ct. J. at 347. The court disapproved of the holdings in *Wallace v. Texas Employers' Ins. Ass'n*, 624 S.W.2d 268 (Tex. Ct. App.—Dallas 1981, no writ), and *Exposition Apartments Co. v. Barba*, 624 S.W.2d 414 (Tex. Ct. App.—Austin 1981, no writ).

298. 638 S.W.2d 183 (Tex. Ct. App.—Dallas 1982, no writ).

299. *Id.* at 184.

300. 623 S.W.2d 306 (Tex. 1981).

301. *Id.* at 308.

302. 625 S.W.2d 22 (Tex. Civ. App.—San Antonio 1981, writ *dism'd*).

303. *Id.* (quoting *Goodman v. Goodman*, 611 S.W.2d 738 (Tex. Civ. App.—San Antonio 1981, no writ)).

In *River & Beach Land Corp. v. O'Donnell*³⁰⁴ the court considered the circumstances under which a party may accept the benefits of a judgment and still appeal. Pursuant to the trial court's judgment of rescission the appellant received certain promissory notes and informed another party that it was now the owner of one of the notes. Recognizing the general rule that "[a] litigant who has voluntarily accepted the benefits of a judgment cannot afterward prosecute an appeal,"³⁰⁵ the court noted two narrow exceptions: "First, if a reversal of the judgment could not possibly affect an appellant's right to the benefit accepted Second . . . where the economic circumstances of the appellant were such that acceptance of the benefits were [sic] not considered voluntary."³⁰⁶ Finding neither exception applicable, the court granted the appellee's motion to dismiss the appeal.³⁰⁷

*Stephens v. Stephens*³⁰⁸ considered the appellate standard for reviewing a trial judge's denial of a request to reopen a case to receive additional evidence. The court noted that the matter is within the discretion of the trial judge and stated that such ruling "would not be interfered with on appeal except for abuse."³⁰⁹ The court also pointed out that the moving party must lay a predicate in order to complain about this issue on appeal.³¹⁰ According to the court, the lower court must continue to have control over the cause when the movant makes his request to reopen and, by such request, the moving party must specify the new evidence to be established.³¹¹

Preservation of cross-points of errors was the subject of *Cameo Construction Co. v. Campbell*.³¹² By a cross-point the appellees claimed that the trial court erred in failing to award them treble damages under the Deceptive Trade Practices Act. Finding that the appellees had failed to make any objection about this point in the record during the trial court proceedings, the court of appeals held that the appellees had waived the cross-point.³¹³

Finally, rule 452,³¹⁴ concerning the publication of court of appeals decisions, has been amended. Under the new rule an opinion shall be published only if, in the judgment of the justices participating in the decision, the judgment is one which: (1) establishes a new rule of law; (2) alters or modifies an existing rule; (3) applies an existing rule to a novel fact situation likely to occur in future cases; (4) involves a legal issue of continuing

304. 632 S.W.2d 885 (Tex. Ct. App.—Corpus Christi 1982, no writ).

305. *Id.* at 888; *accord* Carle v. Carle, 149 Tex. 469, 234 S.W.2d 1002 (1950).

306. 632 S.W.2d at 888; *accord* Haggard v. Haggard, 550 S.W.2d 374, 376 (Tex. Civ. App.—Dallas 1977, no writ).

307. 632 S.W.2d at 888.

308. 625 S.W.2d 428 (Tex. Ct. App.—Fort Worth 1981, no writ).

309. *Id.* at 430.

310. *Id.*

311. *Id.*

312. 642 S.W.2d 10 (Tex. Ct. App.—El Paso 1982, no writ).

313. *Id.* at 13.

314. TEX. R. CIV. P. 452.

public interest; (5) criticizes existing law; or (6) resolves an apparent conflict of authority. Further, the amended rule provides that unpublished opinions shall not be cited as authority by counsel or the court.

XIV. RES JUDICATA

As noted in a prior Survey,³¹⁵ a number of cases have held that mutuality of parties is no longer required in Texas for application of the doctrine of collateral estoppel.³¹⁶ Expanding on these decisions, the court in *Bonniwell v. Beech Aircraft Corp.*³¹⁷ held that a defendant airplane manufacturer could use the doctrine of collateral estoppel offensively to obtain judgment on its cross-claim against a co-defendant for indemnity and contribution because the necessary issues of fact had been adjudicated in a previous action involving a different plaintiff.³¹⁸ *Bonniwell* was one of five lawsuits resulting from a fatal airplane crash. The plaintiff joined both the airplane manufacturer and the air carrier that operated the plane as defendants in the suit, and each of those defendants filed a cross-claim for indemnity and contribution against the other. One of the other lawsuits stemming from the accident, however, proceeded to trial first. The judgment in that earlier suit, which involved the same defendants as *Bonniwell* and identical causes of action, denied the manufacturer's claim for indemnity from the air carrier but only because the jury's fact findings absolved the manufacturer of all liability for the crash. Noting that a judgment for indemnity or contribution necessarily requires a prior determination of liability issues, the court of appeals in *Bonniwell* concluded that the essential issue of fact between the defendants on their cross-claims had already been determined in the earlier litigation.³¹⁹ Consequently, the court affirmed a summary judgment on the manufacturer's cross-claim based on the doctrine of res judicata even though a plaintiff who was not a party to the earlier litigation brought the suit.³²⁰

Of perhaps greater significance in *Bonniwell* was the court's offensive application of the collateral estoppel doctrine. The court acknowledged that no previous Texas case had specifically endorsed an offensive use of collateral estoppel³²¹ even though such a use of the doctrine had been approved by the United States Supreme Court more than three years before in *Parklane Hosiery Co. Inc. v. Shore*.³²² Nevertheless, the court did not

315. See Figari, 1982 Annual Survey, *supra* note 11, at 667.

316. See, e.g., *Tobbon v. State Farm Mut. Auto. Ins. Co.*, 616 S.W.2d 243, 246 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.); *Olivarez v. Broadway Hardware, Inc.*, 564 S.W.2d 195, 198-99 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *Hardy v. Fleming*, 553 S.W.2d 790, 792-93 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

317. 633 S.W.2d 553, 558 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ granted).

318. *Id.*

319. *Id.* at 559.

320. *Id.* at 560-61.

321. *Id.* at 558.

322. 439 U.S. 322, 331-32 (1979). In *Parklane* the Court held that the doctrine of collateral estoppel could be applied offensively provided the defendant received a full and fair opportunity to litigate in the prior suit, suffered no procedural disadvantages because of an

hesitate in adopting the *Parklane* rationale, observing that the policies the Supreme Court identified as supporting an offensive use of the doctrine were identical to those espoused in recent Texas cases.³²³ The careful practitioner should note, however, that the Texas Supreme Court has agreed to review the decision of the court of appeals in *Bonniwell*.³²⁴

XV. MISCELLANEOUS

Attorneys' Fees. A number of decisions during the survey period addressed issues related to the recovery of attorneys' fees. In *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*³²⁵ the court held that a complaint, which contained a specific demand for payment, was sufficient to comply with the thirty-day demand requirement under article 2226,³²⁶ the Texas statute that authorizes recovery of attorneys' fees in specified cases. The cautious practitioner, however, should note that this case appears to be in conflict with a number of Texas decisions holding that the act of filing suit does not meet the demand requirement under the statute.³²⁷ *Schepps Grocery Co. v. Burroughs Corp.*³²⁸ addresses a problem that often arises in proving the amount of recoverable attorneys' fees, that of allocation of attorneys' fees among various claims. Appealing from an adverse judgment that allowed recovery of amounts owed under a contract, the appellant claimed that the trial court had erred in awarding attorneys' fees because the "appellee's attorneys failed to allocate the time spent in prosecuting the claim and in defending" a usury counterclaim.³²⁹ Distinguishing this case from other cases that involved several distinct theories for which there was no overlap in preparation,³³⁰

opportunity unavailable in the previous litigation, and did not risk the possibility of inconsistent decisions. *Id.*

323. 633 S.W.2d at 559 (citing *Windmill Dinner Theatre v. Hagler*, 582 S.W.2d 585 (Tex. Civ. App.—Dallas 1979, writ dismissed); *Olivarez v. Broadway Hardware, Inc.*, 564 S.W.2d 195 (Tex. Civ. App.—Corpus Christi 1978, writ refused n.r.e.); *Hardy v. Fleming*, 553 S.W.2d 790 (Tex. Civ. App.—El Paso 1977, writ refused n.r.e.)).

324. 25 Tex. Sup. Ct. J. 409, 413 (July 7, 1982).

325. 531 F. Supp. 344 (S.D. Tex. 1981).

326. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1982-1983).

327. See, e.g., *Sterling Constr. Co. v. West Tex. Equip. Co.*, 597 S.W.2d 515, 518 (Tex. Civ. App.—Amarillo 1980, no writ); *European Import Co. v. Lone Star Co.*, 596 S.W.2d 287, 291 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ refused n.r.e.). The court in *Boehringer* also held that the rate of prejudgment interest was within the equitable discretion of the court. 531 F. Supp. at 354; see *Dallas-Fort Worth Regional Airport Bd. v. Combustion Equip. Assocs., Inc.*, 623 F.2d 1032 (5th Cir. 1980). Accordingly, the court used a seven percent rate rather than a six percent rate applicable to written contracts and open accounts under art. 5069—1.03. TEX. REV. CIV. STAT. ANN. art. 5069—1.03 (Vernon 1971).

In connection with postjudgment interest it should be noted that federal courts are now authorized to award interest on judgments at the 52-week treasury bill rate, which has been generally higher than the nine percent postjudgment rate prescribed by the Texas statute. Compare Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 302, 96 Stat. 25, 55-56 (1982), with TEX. REV. CIV. STAT. ANN. art. 5069—1.05 (Vernon Supp. 1982-1983).

328. 635 S.W.2d 606 (Tex. Ct. App.—Houston [1st Dist.] 1982, no writ).

329. *Id.* at 611.

330. See *International Sec. Life Ins. Co. v. Finck*, 496 S.W.2d 544 (Tex. 1973) (attorneys' fees were limited to statutory allowance for prosecution of insurance claim and not for time involved pertaining to fraud claim); *Kosberg v. Brown*, 601 S.W.2d 414 (Tex. Civ. App.—

the court concluded that allocation was not required as the usury claim was both a defense to the principal suit and the basis for the counterclaim.³³¹ Accordingly, an overlap among the claims existed, and the appellee was entitled to recover fees for all legal services performed in the case.³³²

For the attorney who believes that the rate of a contingent fee is simply a matter between the attorney and his client, *Hoffert v. General Motors Corp.*³³³ provides a warning to the contrary. In this personal injury action involving a minor the trial court reduced a law firm's contingent fee from one-third to one-fifth of the recovery after the parties had reached a settlement of the action. The Fifth Circuit concluded that the trial court had jurisdiction to limit the amount of the contingent fee and had acted properly in doing so based on the Code of Professional Responsibility of the American Bar Association.³³⁴ The relevant provisions of the Code are based upon Canon 13 of the old ABA Canons of Ethics, which provided that a contract for a contingent fee "should always be subject to the supervision of a court, as to its reasonableness."³³⁵

Representation by More than Two Attorneys. Rule 9³³⁶ contains a little known provision regarding the number of attorneys who may represent a party in an action. Rule 9 provides that "[n]ot more than 2 counsel on each side shall be heard on any question or on the trial, except in important cases, and on special leave of the court."³³⁷ In *Ford Motor Co. v. Nowak*³³⁸ a party attempted to complain on appeal about a violation of rule 9. Finding that the complaint had not been registered until midway through trial, the court of appeals ruled that the point had been waived for purposes of the appeal.³³⁹

Admission of Video Tapes. *In re T.L.H.*³⁴⁰ addressed the procedure for introducing video tapes or tape recordings during trial. Relying on earlier cases that involved impeachment through the use of tape recordings,³⁴¹ the

Houston [14th Dist.] 1980, no writ) (duty on party asserting cause of action to segregate fees connected with causes of action for which attorneys' fees can be recovered from those from which they cannot be recovered); see also *Bray v. Curtis*, 544 S.W.2d 816 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (attorneys' fees only recoverable when provided by statute or contract).

331. 635 S.W.2d at 611.

332. *Id.*

333. 656 F.2d 161 (5th Cir. 1981).

334. *Id.* at 165-66; see Model Code of Professional Responsibility EC 2-20, DR 2-106 (1979). In addition, the court also noted that the trial judge has broad equity power to supervise the collection of attorneys' fees under a contingent fee arrangement. 656 F.2d at 165-66.

335. Canons of Professional Ethics, Canon 13 (1908).

336. TEX. R. CIV. P. 9.

337. *Id.*

338. 638 S.W.2d 582 (Tex. Ct. App.—Corpus Christi 1982, no writ).

339. *Id.* at 598.

340. 630 S.W.2d 441 (Tex. Ct. App.—Corpus Christi 1982, writ dismissed).

341. See *Seymour v. Gillespie*, 608 S.W.2d 897 (Tex. 1980); *Cummings v. Jess Edwards, Inc.*, 445 S.W.2d 767 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).

court espoused the following seven factors to be taken into account in determining the admissibility of tape recordings:

- (1) that the recording device was capable of taking testimony;
- (2) that the operator of the device was competent;
- (3) the authenticity of the correctness of the recording;
- (4) that changes, additions, or deletions have not been made;
- (5) the manner of the preservation of the recording;
- (6) the identification of the speakers; and
- (7) that the testimony elicited was voluntarily made without any kind of inducement.³⁴²

Finding that the foregoing factors had not been satisfied, the appellate court concluded that reversible error had been committed by allowing the introduction of tape recordings in this child custody case.³⁴³

Notice of Trial Setting. Rule 245³⁴⁴ provides that the court may set contested cases for trial with reasonable notice to the parties of not less than ten days. In *P. Bosco & Sons Contracting Corp. v. Conley, Lott, Nichols Machinery Co.*³⁴⁵ the clerk of the court notified the parties of a trial setting by postcard. Apparently, the customary practice in Dallas County had been to notify counsel of a trial setting by postcard.³⁴⁶ Relying on rule 21a,³⁴⁷ which governs notice requirements under the rules of procedure and generally requires notice "in person or by registered mail, or in any other manner as directed by the court," the court of appeals determined that the postcard notice was insufficient and, thus, overturned a judgment entered against a defendant who complained about lack of notice of the trial setting.³⁴⁸ The appellate court, however, noted that the postcard method may be sufficient in the future if the trial judge actually directs notice in such a manner.³⁴⁹

Disqualification of Trial Judge. In *Whittington v. Whittington*³⁵⁰ the court was called upon to consider the issue of whether the presiding judge of the district could assign a retired district judge, who had been defeated for reelection, to hear the trial of a divorce case. Although article 200a³⁵¹ implicitly prohibits the assignment of former district judges who have been defeated for reelection, the court of appeals concluded that the term "retired" district judge was not equivalent to "former" district judge and, thus, found no basis for disqualification.³⁵²

342. 630 S.W.2d at 447.

343. *Id.* at 448.

344. TEX. R. CIV. P. 245.

345. 629 S.W.2d 142 (Tex. Ct. App.—Dallas 1982, writ ref'd n.r.e.).

346. *Id.* at 143.

347. TEX. R. CIV. P. 21a.

348. 629 S.W.2d at 144.

349. *Id.*

350. 638 S.W.2d 92 (Tex. Ct. App.—Dallas 1982, writ dismiss'd).

351. TEX. REV. CIV. STAT. ANN. art. 200a, § 5a (Vernon Supp. 1982).

352. 638 S.W.2d at 93; see *Taylor v. State*, 599 S.W.2d 831, 832 (Tex. Crim. App. 1980); *Todd v. State*, 598 S.W.2d 286, 289 (Tex. Crim. App. 1980); *Jackson v. State*, 567 S.W.2d 222, 223 (Tex. Crim. App. 1978).